Supreme Court, U.S.
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No. 00-493

In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; JIM BEAM BRANDS CO.; BROWN-FORMAN CORPORATION; DAVID SHERMAN CORPORATION; REMY AMERIQUE, INC.; and SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers,

Petitioners,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. • Is Georgia's "import" approach – establishing double taxation for alcoholic beverages produced out-of-state, not using "Georgia grown products," and thereafter "imported" into Georgia (*see* Ga. L. 1985 at p. 665, § 2, *codified at* O.C.G.A. § 3-4-60 (sometimes the "1985 Statute")) – immunized by the Twenty-First Amendment against challenge under the Interstate Commerce Clause (and the Equal Protection Clause) as determined by the Georgia courts in this case and in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987)?

• Or does the import approach violate the Interstate Commerce Clause, notwithstanding the Twenty-First Amendment, as determined by the Florida Supreme Court in *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129 (Fla. 1989)? And does the requirement to use local agricultural product violate both the Commerce and Equal Protection Clauses, notwithstanding the Twenty-First Amendment, as determined by the Florida Supreme Court in *Division of Alc. Bevs. & Tob. v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988) (subsequent history omitted)?

Subsidiary questions:

1a. Typically, a test of congruence is applied: The State proffers a purpose to justify legislation challenged under the Commerce Clause and the reviewing court tests the proffered purpose against the effects of the challenged legislation. At bottom, this remains an "effect" challenge: Discriminatory effect vitiates the legislation even if the

QUESTIONS PRESENTED FOR REVIEW – Continued

proffered purpose is genuine. This "effect" test of congruence may be preferred, as a prudential matter, when adjudicating a discrimination challenge, but is a direct challenge to discriminatory "purpose" also generally authorized under the Commerce Clause by the language of *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), and other cases? If generally authorized, is a direct challenge to discriminatory purpose nonetheless foreclosed when the proffered purpose is a declared purpose stated in the legislation itself? May legislative history – events and statements contemporaneous with and part of the legislative consideration and enactment of the statute – be used, not to interpret the meaning of the statute, but to challenge the statute as animated by discriminatory purpose, notwithstanding any guise or subterfuge to the contrary?

1b. If a direct challenge to discriminatory purpose is not generally authorized under the Commerce Clause, is there an exception when the challenged legislation has, with legislative findings, sought to pre-determine the "effect" as well? Apart from their relation to the availability of a purpose challenge, do such legislative findings foreclose an "effect" challenge? What level of scrutiny, or deference, should be applied to such legislative findings in a discrimination challenge under the Interstate Commerce Clause? What level should be applied in nexus, multiple taxation, and tax-to-cost relation challenges under the Interstate Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

QUESTIONS PRESENTED FOR REVIEW – Continued

1c. When the State defends with an assertion of Twenty-First Amendment immunity, does this assertion change the tests and level of scrutiny generally applicable to discrimination (as well as nexus, multiple taxation, and tax-to-cost relation) challenges under the Interstate Commerce Clause and the Due Process Clause of the Fourteenth Amendment under the circumstances outlined above? More particularly, should the courts follow the approach represented, by way of example, by the

- the Fifth Circuit's decision in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994),

- the D.C. Circuit's decision in *Milton S. Kronheim & Co. v. District of Colombia*, 91 F.3d 193 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), whose approach was generally followed in this case, or

- the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, Nos. 00-1044 & 00-1046, 2000 U.S. App. LEXIS 22991 (7th Cir. Sept. 13, 2000)?

2. • Does the Twenty-First Amendment provide any immunity for a violation of the Foreign Commerce Clause as determined by the Georgia courts in this case?

- Or is such immunity unavailing as generally determined by General Agreement on Trade and Tariffs (GATT) Panel on United States – Measures Affecting Alcoholic and Malt Beverages in March 1992?

QUESTIONS PRESENTED FOR REVIEW – Continued

Subsidiary questions:

2a. When the challenge is based on the Foreign Commerce Clause, does this change the tests and level of scrutiny that would otherwise generally apply under the circumstances outlined above?

2b. If the Twenty-First Amendment does provide any level of immunity for a violation of the Foreign Commerce Clause, does the assertion of this immunity change the tests and level of scrutiny generally applicable under the circumstances outlined above?

CORPORATE DISCLOSURE STATEMENT

Austin, Nichols & Co., Inc. is a privately held corporation, which is 100% owned by the French corporation, Pernod Ricard S.A., which is publicly traded on the Bourse.

Bacardi-Martini U.S.A., Inc. is 100% owned by Bacardi Limited, a Bermudian privately held corporation.

Jim Beam Brands Co. is 100% owned by Jim Beam Brands Worldwide, Inc., which is 100% owned by Fortune Brands, Inc., a publicly traded Delaware corporation.

Brown-Forman Corporation has no parent or publicly held company owning 10% or more of the corporation's stock.

David Sherman Corporation has no parent or publicly held company owning 10% or more of the corporation's stock.

Remy Amerique, Inc. is a privately held corporation, which is 100% owned by the French corporation, Cointreau S.A., which is 100% owned by Remy-Cointreau, S.A., a French publicly traded company.

Southern Wine & Spirits of America, Inc. has no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

OPINIONS AND ORDERS 1

JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Georgia's 1985 Statute Was Enacted, Using the Guise of a So-Called "Import" Approach, in Circumvention of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), to Continue the Discriminatory and Protectionist Double Taxation that Has Been in Place Since the 1930s 2

B. Since 1985, Georgia Has Consistently Avoided Application of Federal Law 7

1. In the First Challenge to the "Import" Approach, the Georgia Supreme Court Construed Plaintiff Heublein's Challenge as an "Unchallenge" and Summarily Rejected the Appeal 7

2. Faced with Incontestable Discrimination in the Legislative History of the 1985 Statute, the Georgia Supreme Court Held *the Pre-1985 Statute* Unconstitutional, but Made its Holding Prospective Only 8

3. Despite this Court's Reversal of Prospectivity in *Beam*, the Georgia Supreme Court Relied upon the *Reich* "Bait and Switch" to Avoid Federal Law 9

TABLE OF CONTENTS – Continued

Page

4. The Florida Supreme Court, in *Ivey*, Refused to Follow the Georgia Supreme Court's *Heublein* Decision and Held the "Import" Ruse to Be Unconstitutional 9

5. The GATT Panel on United States – Measures Affecting Alcoholic and Malt Beverages Held Georgia's 1985 Statute to be a Violation of the GATT 11

C. The Present Case: The Twenty-First Amendment Was Upheld as an Immunity to All Claims 12

ARGUMENT AND CITATION OF AUTHORITY 15

A. Now that Other States Have Brought Themselves into Compliance with *Bacchus*, only this Court Can Protect Their Commerce from Georgia's Willful Hold-Out Discrimination 15

B. The Conflict between Georgia and Florida over the "Import" Approach Centers on the Nature of a Challenge to Discriminatory Purpose under the Commerce Clause 17

C. The Conflict also Points up a Split among the Circuits over How to Weigh Purpose when Deciding Twenty-First Amendment Immunity .. 20

D. This Case also Presents the Important Question Whether the Twenty-First Amendment Affords Immunity to the States for their Violations of the Foreign Commerce Clause 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV, § 1 ..... 1, 14

U.S. Const. amend. XXI ..... *passim*

U.S. Const. art. I, § 8, cl. 3 ..... 1, 13, 25

U.S. Const. art. I, § 10, cl. 2 ..... 1, 13

U.S. Const. art. VI 1

STATUTES AND INTERNATIONAL AGREEMENT

28 U.S.C. § 1257 1

28 U.S.C. § 1341 15

Ga. L. 1985 at p. 665, *codified at* O.C.G.A. § 3-4-60 ..*passim*

Ga. L. 1992 at p. 1458 13

General Ageement on Trade and Tariffs (GATT) 2, 11, 12

DECISIONS OF THE
UNITED STATES SUPREME COURT

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 21

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) ....*passim*

Bayside Fish Flower Co. v. Gentry, 297 U.S. 422 (1936) 19

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 15, 23

California Ret. Liq. Deals Ass'n v. Midcal Alum., Inc., 445 U.S. 97 (1980) 14, 21

TABLE OF AUTHORITIES – Continued

Page

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 14, 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 20

Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) 25

Crosby v. National Foreign Trade Counsel, 503 U.S. –, 120 S. Ct. 2288 (2000) 7

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 19

Freeman v. Hewitt, 329 U.S. 249 (1946) 20

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) 15

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 18

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 2, 9

James B. Beam Distilling Co. v. Georgia, 513 U.S. 1056 (1994) 9

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 24

Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456 (1981) 20

North Dakota v. United States, 495 U.S. 423 (1990) 22

Postal Tel.-Cable Co. v. Borough of Taylor, 192 U.S. 64 (1904) 19

TABLE OF AUTHORITIES – Continued

Page

Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252 (1919) 19

Reich v. Collins, 513 U.S. 106 (1994) 9

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 18, 24

State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936) 2, 3

Washington v. United States, 460 U.S. 536 (1983) 19

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 16

OTHER DECISIONS

Age Int'l. Inc. v. Miller, 830 F. Supp. 1484 (N.D. Ga. 1993) 12, 15

Bridenbaugh v. Freeman-Wilson,. Nos. 00-1044 & 00-1046, 2000 U.S. App. LEXIS 22991 (7th Cir. Sept. 13, 2000) 23, 24

Cooper v. McBeath. 11 F.3d 547 (5th Cir. 1994) ... 14, 20, 21

Dickerson v. Bailey, 87 F. Supp. 2d 691 (S.D. Tex. 2000) 14

Division of Alc. Bevs. & Tob. v. McKesson Corp., 524 So. 2d 1000 (Fla. 1988) 6, 21

GATT Panel on U.S. – Measures Affecting Alcoholic and Malt Beverages (Mar. 16, 1992) 11, 12, 23, 24

Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190 (1987) ..... *passim*

Heublein, Inc. v. Department of Alc. Bev. Cont., 237 Va. 192, 376 S.E.2d 77 (1989) 21

TABLE OF AUTHORITIES – Continued

Page

Ivey v. Bacardi Imports Co., 541 So. 2d 1129 (Fla. 1989) ..... *passim*

Indiana Wholesale Wine & Liquor Co. v. State, 662 N.E.2d 950 (Ind. App. 1996) 14, 21

James B. Beam Distilling Co. v. State, 259 Ga. 363, 382 S.E.2d 95 (1989) 8

James B. Beam Distilling Co. v. State, 263 Ga. 609, 437 S.E.2d 782 (1993) 9

Kendall-Jackson Win., Ltd. v. Branson, 82 F. Supp. 2d 844 (N.D. Ill. 2000) 21

Lau's Corp. v. Haskins, 621 Ga. 491, 405 S.E.2d 474 (1991) 14

Loretto Winery, Ltd. v. Gazara, 601 F. Supp. 850 (S.D.N.Y. 1985) 6, 21

Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996).....22, 23

Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004 (W.D. Mo. 1998).....14, 21

Reich v. Collins, 262 Ga. 625, 422 S.E.2d 846 (1992) 9

Rice v. Alcoholic Bev. Cont. Apps. Bd., 21 Cal.3d 431, 579 P.2d 476 (1978).....14, 21

OPINIONS AND ORDERS

The Superior Court of Fulton County, State of Georgia, filed a Final Order in this matter, Civil Action File Nos. E-3793 & E-25073, on May 21, 1998. The Georgia Supreme Court passed a minute order in Case No. S00A1357 on June 30, 2000 dismissing the appeal.

JURISDICTION

The Georgia Supreme Court's minute order was passed on June 30, 2000. Jurisdiction is conferred upon this Court under 28 U.S.C. § 1257.

PROVISIONS INVOLVED

This action is a challenge to Georgia's double taxation for alcoholic beverages produced out-of-state, not using "Georgia grown products," enacted at Ga. L. 1985 at p. 665, § 2, *codified at* O.C.G.A. § 3-4-60 (sometimes the "1985 Statute"). The action is based on, among other provisions, the Interstate and Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3; the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1; the Import Export Clause, U.S. Const. art. I, § 10; and the Supremacy Clause, U.S. Const. art. VI, which are set out in the Appendix, and also involves the Twenty-First Amendment, U.S. Const.

amend. XXI, and the General Agreement on Trade and Tariffs (GATT).

STATEMENT OF THE CASE

A. Georgia's 1985 Statute Was Enacted, Using the Guise of a So-Called "Import" Approach, in Circumvention of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), to Continue the Discriminatory and Protectionist Double Taxation that Has Been in Place Since the 1930s.

The double-taxing 1985 Statute was enacted in spring of 1985. Georgia had imposed discriminatory double taxation (under what is sometimes called the Pre-1985 Statute) for decades. The double taxation of the 1985 Statute is a mere continuation of the double taxation of the Pre-1985 Statute. The Pre-1985 Statute was struck down as a violation of the Commerce Clause. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). The present lawsuit is an effort, the second such effort, to do the same for the 1985 Statute.

The crisis for Georgia's discriminatory taxation scheme began in 1984. Until 1984, a minority of States (Hawaii, Georgia, and Florida among them), relying upon *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), and progeny, favored alcoholic beverages produced within their borders by imposing lighter taxation on those beverages while imposing heavier taxation on alcoholic beverages produced in the other States. In 1984, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court struck down Hawaii's preferential taxation for in-

state alcoholic beverages as discriminatory against out-of-state beverages and as simple economic protectionism, all in violation of the Interstate Commerce Clause. The Court did so expressly notwithstanding its earlier *Young's Market* decision and progeny.[1] With the advent of *Bacchus*, the remaining discriminatory taxation against out-of-state beverages in a minority of jurisdictions fell State by State through repeal, attorney general opinion, or court decision – with the exception of at least two States: Georgia and Florida.

In some of these jurisdictions, the State officials took bold action by declining to apply and implement their own State tax statutes in a discriminatory fashion, even in advance of corrective action by the State legislature.[2] Georgia officials were not so bold, but they did monitor what was happening in the other affected States in order to consider their options for correcting Georgia's discrimination against out-of-state alcohol products. By early September of 1984, Georgia officials had concluded that the Georgia tax scheme (with its so-called "preferential tax," preferring in-state product and suppliers over out-

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[1] *See Bacchus*, 468 U.S. at 274 & n.13 ("Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment . . . ," citing *Young's Market*).

[2] The legislative discussion in the Georgia House, at the time of the enactment of the 1985 Statute, likewise took note of these developments: "The State of Tennessee, in view of the Bacchus decision, has already reversed itself. The State of Virginia has reversed itself. The State of Florida has reversed itself, and they've gone into, they've got a court litigation going on in this case down there now." All references to evidence are supported and explained in the Appendix.

of-state product and suppliers) was unconstitutional. Further, Georgia officials (of the Georgia Revenue Department, after consulting with the Georgia Law Department) concluded that the unconstitutionality should be corrected by equalizing the tax. The tax on in-state liquor and wine would be brought up to and equalized at the level of taxation already imposed upon out-of-state liquor and wine. The Revenue Department proposed an equalization bill that would, in the words of the Department's Director of the Alcohol & Tobacco Tax Unit, correct the illegal pre-1985 "preferential tax treatment for in state distillers and vint[n]ers," now clearly unconstitutional in light of "the U. S. Supreme Court Decision in the State of Hawaii case."

In-state distillers and vintners, and their lobbyist lawyers, fiercely resisted equalization. To protect the competitive advantage afforded them by the preferential tax, the in-state lobby devised a guise by which they hoped to continue the same double taxation under another name. Their subterfuge became known as the *import approach*. Under the import approach, the historic first half of the tax would be applied, as before, to all alcohol products regardless of origin. The historic second half of the tax would be renamed an import tax and applied to all alcohol products "imported" into Georgia. Since the in-state products, by definition, could not be "imported" into Georgia, these products would never become subject to the second tax. Since all out-of-state products must cross over a Georgia border, all out-of-state products would be subject to the second tax. The net effect of the import approach would be that the same discriminatory and protectionist double taxation of the

Pre-1985 Statute would go on in precisely the same manner – but under a new "import" name.

A critical question in the ensuing legislative struggle: Could the tax break be maintained by renaming the second half of the tax and calling it an import tax: "Is it further true that the import tax, the new tax added, is just a new tax not called an excise tax, but an import tax, to maintain that base of income that we presently have from the alcohol?" A proponent of the import approach characterized the bill as an effort, using "verbiage," to "shore up" "the existing law that has been in effect in this state since 1937." Another legislator, more honest, decried the bill as "a ***PHONEY*** *new import tax* called a different name."[3] The in-state lobby recruited George D. Busbee to the effort, former Governor and, by this time, in private practice at the Atlanta firm of King & Spalding. He urged that, without economic protectionism, Georgia "would [be] put . . . at a competitive disadvantage with the 19 states now providing similar incentives." Proponents of equalization easily rebutted that contention – if all States complied, there would be no competitive disadvantage for any one of them – and urged compliance with this Court's *Bacchus* decision: "I think that ***all states*** *is going to come down to have an equal tax rate* so that they can comply with the commerce clause that is deemed by the Supreme Court of this land." Mr. Busbee would have nothing of it: "**[D]o not let U.S. Supreme Court** change state public policy."

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[3] John Linder, now U.S. Representative. (All emphasis herein is supplied unless otherwise indicated.)

Proponents of the import approach won the day with yet more economic protectionism. They built into their bill a second protection requiring that producers use "Georgia grown products" to qualify for the tax break (while imposing double taxation on all those producers, and their goods, who use agricultural products of out-of-state origin). *See* Ga. L. 1985 at p. 665, § 2, *codified at* O.C.G.A. § 3-4-60(3). With this second protection,[4] proponents of the import approach could appeal to rural legislators: "[T]he measure that I'm now bringing before you . . . will give the *favorable tax preference* to the agricultural products ***of this state***." At the end of the legislative proceedings that gave rise to the 1985 Statute, there was this striking admission:

> What I'm telling you is that there is a piece of legislation in the Governor's office that provides the tax benefits to ***our own people*** and ***our own agricultural products***, *both with respect to alcohol tax on distilled spirits and on domestically produced wine.*

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[4] Such a requirement has been held to constitute an independent violation of the Commerce Clause. *See Loretto Winery, Ltd. v. Gazara*, 601 F. Supp. 850, 858-59 (S.D.N.Y.), *modified on other grounds*, 761 F.2d 140 (2d Cir. 1985); *see also, e.g., Bacchus*, 468 U.S. at 268-73; *Division of Alc. Bevs. & Tob. v. McKesson Corp.*, 524 So. 2d 1000, 1006-09 (Fla. 1988) (subsequent history omitted) (similar content requirement under Florida law held to violate both Commerce and Equal Protection Clauses).

B. Since 1985, Georgia Has Consistently Avoided Application of Federal Law.

1. In the First Challenge to the "Import" Approach, the Georgia Supreme Court Construed Plaintiff Heublein's Challenge as an "Unchallenge" and Summarily Rejected the Appeal.

The first challenge to the import approach came in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). Without benefit of discovery, *Heublein* was a facial challenge. Counsel for the plaintiff, in oral argument before the trial court, concentrated the challenge on discriminatory effect,[5] stating in a rhetorical flourish that " 'we are not sitting here and challenging what the state says their purpose was in adopting this legislation. This is not a factual case. What we are saying is whatever you feel your reason was, it doesn't fly in light of the Commerce Clause.' " *See Heublein*, 256 Ga. 578, 351 S.E.2d at 195-96. The Georgia Supreme Court seized upon this statement in the trial court transcript and ruled, summarily rejecting the appeal, that the plaintiff had left purpose "unchallenged." *Id.* 351 S.E.2d at 196.

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[5] Counsel presumably sought to avoid complications in challenging legislative "intent" and lacked the evidentiary basis to do so in any event. He no doubt also wanted to avoid the expense of developing legislative history. *See Crosby v. National Foreign Trade Council*, 530 U.S. –, 120 S. Ct. 2288, 2304 (2000) (Scalia, J., concurring). A facial challenge based upon discriminatory effect is, moreover, a time-honored tradition, often encouraged by the cases so as to avoid the embarrassments of a direct challenge to purpose. *See infra.*

2. Faced with Incontestable Discrimination in the Legislative History of the 1985 Statute, the Georgia Supreme Court Held *the Pre-1985 Statute* Unconstitutional, but Made its Holding Prospective Only.

The next challenge was to the Pre-1985 Statute. Limited discovery turned up evidence surrounding the enactment of the *1985 Statute*, the statute under challenge here, so compelling that the trial court struck down the predecessor statute:

> This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history . . . . The protectionist purpose of the statute is further indicated by the exhibits "A-3" through "A-13" produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and produced to plaintiffs by the defendants pursuant to this Court's Order of December 3, 1987[ ].

The Georgia Supreme Court affirmed "that the *purpose* and effect of the statute was economic protectionism," *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95, 96 (1989), but avoided application of Federal law by making the ruling prospective only. Even without its skirting prospectivity ruling, this *Beam* decision would not have brought Georgia into compliance with Federal law: The Pre-1985 Statute no longer existed, and its successor in double taxation, the 1985 Statute, had already been upheld in *Heublein*, ironically for the reason that "purpose" was "unchallenged."

3. Despite this Court's Reversal of Prospectivity in *Beam*, the Georgia Supreme Court Relied upon the *Reich* "Bait and Switch" to Avoid Federal Law.

This Court reversed prospectivity. *James B. Beam Distilling*, 501 U.S. 529 (1991). After remand, the Georgia Supreme Court, anticipating and discussing the *Beam* case, established new procedural bars in the notorious Federal pensioners' case, *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992), which were then applied in the *Beam* case to avoid, once again, the application of Federal law. *See James B. Beam Distilling Co. v. State*, 263 Ga. 609, 437 S.E.2d 782 (1993). This Court, reversing in *Reich*, branded the Georgia Supreme Court's newly created procedural bars a " 'bait and switch,' "*Reich v. Collins*, 513 U.S.106, 111 (1994) (tendential quotation marks in original), but it was too late for the *Beam* case. *See James B. Beam Distilling Co. v. Georgia*, 513 U.S. 1056 (1994) (denying cert.)

4. The Florida Supreme Court, in *Ivey*, Refused to Follow the Georgia Supreme Court's *Heublein* Decision and Held the "Import" Ruse to Be Unconstitutional.

Florida, like Georgia, had resisted *Bacchus*. When the Georgia Supreme Court rejected the *Heublein* challenge to the new import approach, the Florida legislature followed suit and enacted an import approach statute of its own, specifically "modeled after Georgia's import tax on alcoholic beverages." *Ivey v. Bacardi Imports Co.*, 541 So. 2d 1129, 1137 & n.5 (Fla. 1989). The Florida Supreme Court

declined to follow the Georgia Supreme Court's *Heublein* decision, however:

> The tax scheme at issue was modeled after Georgia's import tax on alcoholic beverages which was recently upheld by the Georgia Supreme Court in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 *appeal dismissed*, 483 U.S. 1013, 107 S. Ct. 3253, 97 L. Ed. 2d 753 (1987). In *Heublein*, the court employed the balancing approach set forth in Bacchus to uphold a discriminatory import tax on distilled spirits and wines, because "the unchallenged purpose of the import tax implicate[d] central concerns of the Twenty-first Amendment, i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors." The import tax which was upheld in *Heublein* was based on legislative findings similar to those set forth in section 9. However, unlike the plaintiffs in the instant case, the plaintiffs in *Heublein* did not challenge the Georgia general assembly's stated purpose for the import tax. They simply conceded the existence of the Twenty-first amendment concerns and argued that whatever the underlying purpose, " 'it doesn't fly in light of the Commerce Clause.' "

Id. at 1137 (citation and footnotes omitted). The Florida Supreme Court, squarely presented with the challenge that was said not to have been made in *Heublein*, went on to consider the merits of the challenge and rejected the import approach as "unconstitutional." *Id.* at 1137-40. Georgia now stands alone in its reliance upon the import approach to justify differential taxation on in-state and out-of-state alcoholic beverages.

5. The GATT Panel on United States – Measures Affecting Alcoholic and Malt Beverages Held Georgia's 1985 Statute to be a Violation of the GATT.

At the same time, perhaps spurred on by the *Bacchus* decision's upholding of the principle of nondiscrimination in interstate commerce, even as applied to alcoholic beverages, Canada moved to uphold this principle in international commerce and challenged, under the General Agreement on Trade and Tariffs (GATT), numerous discriminatory and protectionist provisions enacted by United States political subdivisions, including the very Georgia statute under challenge here. The resulting decision of the GATT Panel on United States – Measures Affecting Alcoholic and Malt Beverages (Mar. 16, 1992), which only dealt with measures affecting wine and malt beverages, specifically condemned the Georgia statute's double taxation, as it applies to out-of-state wine, as a violation of the GATT.[6]

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[6] The Panel decision found in part:

> 5.20 The Panel next examined the claim by Canada that the lower excise tax rate or the tax exemption provided by the states of Alabama, Georgia, Iowa, Nebraska and New Mexico to wine based upon the in-state or domestic origin of the product was contrary to Articles III:1 and III:2. The Panel recalled the United States arguments that the lower excise tax rates and tax exemptions in the states of Alabama, Georgia, Nebraska and New Mexico were allowable as subsidies under Article III:8(b), and that the state of Iowa applied the same tax rate to wine from all sources sold at wholesale. For the same reasons as those enunciated with respect to the federal excise tax

C. The Present Case: The Twenty-First Amendment Was Upheld as an Immunity to All Claims.

Chastened by the 1991 loss on prospectivity in *Beam* (but before the ultimately successful "bait and switch" in 1994), Georgia again contemplated equalization. What emerged from the 1992 Georgia legislative session, however, was procedural manipulation – a newly shortened 90-day statute of limitations, a denial of interest, a useless credit, among other things. *See Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484, 1489 (N.D. Ga. 1993), *aff'd*, 37 F.3d 637 (11th

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> on beer, the Panel found that the *application of differential state excise tax rates in the states* of Alabama, *Georgia*, Iowa, Nebraska and New Mexico based upon the origin of the wine, which ***discriminates against imported wine in favour of the domestic like product***, is inconsistent with Article III:2, first sentence. Also, for the same reasons enunciated earlier, the Panel found that the state tax measures in issue are not allowable as subsidies under Article III:8(b).

GATT Panel Decision ¶ 5.20 (emphasis in part omitted). The Panel concluded that

> (e) the provision by the states of Alabama, Georgia, Nebraska and New Mexico of lower excise tax rates on wine based upon its in-state or domestic origin, which lower rates are not available to imported wine, is inconsistent with Article III:2, first sentence, and is not covered by Article III:8(b).

Id. ¶ 6.1(e). After initially defending Georgia's discriminatory practices before the Panel, once the adverse decision was rendered, the United States, through its Ambassador Rufus Yerxa, decided not to oppose formal adoption of the Panel's report.

Cir. 1994). The new 90-day limitations period prompted the instant lawsuit. Petitioners filed their administrative applications with the Georgia Revenue Department, as prescribed by statute, and when "the Department took no action on the applications" (as Respondents later admitted and as U.S. District Court found, *see id.* at 1496-97), Petitioners filed their "suit" on the 88th day – barely "within 90 days after the effective date" as the 1992 procedural limitations had commanded, on pain of losing the claims altogether.[7]

Acutely aware of the *Heublein* whipsaw, Petitioners launched a much expanded challenge – facial and applied, potential and actual – to the 1985 Statute, asserting every available Interstate Commerce Clause claim, attacking both discriminatory purpose and/or effect and making nexus, multiple taxation, and tax-to-cost relation claims as well. Petitioners brought additional claims under the Foreign Commerce Clause, the Import Export

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[7] (d) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which an application for credit or claim for refund has been filed prior to the effective date of this Act, the law which was in effect at the time the application for credit or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payments, and provided, further, *that if a suit for refund or credit has not been filed prior to the effective date of this Act with regard to any such application or claim, **any suit for recovery of a credit pertaining to such a claim or application must be filed within 90 days after the effective date of this Act.***

See Ga. L. 1992, p. 1458, § 5(d).

Clause, the Due Process Clause, and the Equal Protection Clause, among others. Opposing motion for summary judgment,[8] Petitioners exhaustively supported all of these claims with extensive evidentiary materials and legal analysis. The trial court solicited proposed orders on floppy, and with almost no modification, Respondents' floppy became Fulton Superior Court's Final Order. Skipping over Petitioners' extensive showing (in disregard of the teachings of this Court and others[9]), the Final Order

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[8] Under a State law regime indistinguishable from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Compare Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991).

[9] Numerous decisions confirm that a court must "turn first *before assessing the impact of the Twenty-first Amendment* to consider whether the [state] statute does in fact conflict with federal law." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984); *accord California Ret. Liq. Deals. Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97 (1980); *Bacchus*, 468 U.S. 263; *Cooper v. McBeath*, 11 F.3d 547, 552-54 (5th Cir.) (first conducting a "traditional Commerce Clause" analysis), *cert. denied*, 512 U.S. 1205 (1994); *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 707 (S.D. Tex. 2000) ("In applying the two-tier balancing test to challenged liquor statutes to determine whether they discriminate against out-of-state interests and, if so, whether they are 'saved' by the twenty-first amendment"); *Rice v. Alcoholic Bev. Cont. Apps. Bd.*, 21 Cal. 3d 431, 439, 579 P.2d 476, 482 (1978) ("Our first inquiry"); *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950, 964 (Ind. App. 1996) ("If the operation of the Twenty-first Amendment is to 'save' state regulation otherwise invalid under the 'negative' Commerce Clause, one must a fortiori conclude that the state regulation is constitutionally infirm *before* considering the extent to which the Twenty-first Amendment 'saves' the regulation from invalidity" (citation omitted), *in part vacated on other grounds, Indiana W.W.&L. Co., Inc. v. State*, 695 N.E.2d 99 (Ind. 1998); *see also Ivey*, 541 So. 2d at 1136; *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1017 (W.D. Mo. 1998).

effectively upheld the Twenty-First Amendment as an immunity to all of Petitioners' claims.[10] The Georgia Supreme Court summarily dismissed Petitioners' appeal without opinion.

ARGUMENT AND CITATION OF AUTHORITY

A. Now that Other States Have Brought Themselves into Compliance with *Bacchus*, only this Court Can Protect Their Commerce from Georgia's Willful Hold-Out Discrimination.

Even if classic circumstances, *see* Sup. Ct. R. 10(a), (b) & (c), were not present, prudential considerations would strongly favor review on certiorari. When *Bacchus* was rendered, as many as 19 other States had various forms of discriminatory taxation in violation of the Federal Constitution. Because the violations involve State taxes, they cannot be reviewed in the lower Federal courts. *See Age Int'l*, 830 F. Supp. at 1502 (dismissing "on jurisdictional grounds" under the Tax Injunction Act, 28 U.S.C. § 1341). Short of eventual action by this Court, it is left to each State to sort out its own compliance with the Federal Constitution. The argument against compliance is always the same, as it was here: Former Governor Busbee urged

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[10] In contravention of established precedent as to some three of Petitioners' claims (the nexus, multiple taxation, and tax-to-cost relation claims – sometimes called direct regulation challenges). *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 334-35 (1989) (plurality opinion) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (holding supported by five Justices)).

that the double taxation be retained because, without protectionism, Georgia "would [be] put . . . at a competitive disadvantage with the 19 states now providing similar incentives." The argument is, of course, fallacious. The Commerce Clause establishes a "unitary national market," in effect a free trade zone, among the several States. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Just as it required Georgia to resist Mr. Busbee's importuning for special "incentives" and special "competitive" advantages for "local industries," the Commerce Clause requires all other States to do the same. If 19 other States did provide protectionist incentives, those incentives would have to go as well.

And they did fall, with Georgia and Florida as holdouts, clinging to the import approach. The Florida Supreme Court could easily have followed Georgia's *Heublein* decision to uphold Florida's import statute (specifically "modeled after Georgia's import tax on alcoholic beverages," *Ivey*, 541 So. 2d at 1137). But the *Ivey* court, in a remarkable tribute to the confidence the framers of the Tax Injunction Act showed in establishing this unusual system of self-review, took on the import approach and unanimously condemned its own State's statute as "unconstitutional." *Id.* at 1137-40. Two High State courts have now passed on the constitutionality of the import approach and reached diametrically opposed results. No other Federal court can resolve, or even consider, this conflict. If Georgia's import approach is allowed to stand, unreviewed, in this closely watched industry, it could well lead to a new proliferation of "import" exceptions. Even if none of this were true, especially when other States have brought themselves into

compliance, Georgia should not be allowed to profit, to the disadvantage of other States, from its hold-out position and from its studied refusal at each step of the way to apply Federal law. After more than a decade of litigation, multiple court challenges in State and Federal court, and repeated legislative initiatives, there is no other recourse for Petitioners or the other compliant States.

B. The Conflict between Georgia and Florida over the "Import" Approach Centers on the Nature of a Challenge to Discriminatory Purpose under the Commerce Clause.

"Purpose" often stands at the disputed intersection of the Twenty-First Amendment and the Commerce Clause. Courts have searched for the "central purpose of the provision," *e.g.*, *Bacchus*, 468 U.S. at 276, and of course, discriminatory "purpose" often forms the basis of challenge under the Commerce Clause, *e.g.*, *id.* at 270. Even conceding that the term may have differing meanings in each context,[11] intersection, and even collision, is unavoidable: Is the "purpose" of the legislature within the "purpose," or reserved power, of the Amendment? The watchword of *Bacchus* and other cases in negotiating this intersection is pragmatic harmonization. *See id.* at 275. This effort assumes that the legislative "purpose" has

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[11] Referring, in the one case, to the purposes or, perhaps better said, powers set out in the text of the Amendment, intended by its framers, and otherwise implied by the structure of the Constitution and, in the other case, to the purposes of the enacter or implementer of the challenged legislation.

already been established.[12] Complicating the inquiry into purpose is the great temptation, as in all Commerce Clause cases, for the State legislature to discriminate against unrepresented outside interests and to dissemble about doing so – precisely so as to preserve the discriminatory measure against challenge. *See generally South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

Even without the overlay of the Twenty-First Amendment, the ways in which a plaintiff may establish, and challenge, purpose in a Commerce Clause case are highly disputed. The cases frequently avoid implications arising from evidence of purposive discrimination by declining to reach the issue and resolving the case instead on "effect" grounds. *E.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). Presumably, this avoidance is to be preferred as a prudential matter when the plaintiff's claim will be sustained in any event on another basis. But has this technique crystalized, as held below, into the exclusive means to challenge purpose? If direct challenge to purpose remains a viable Commerce Clause claim, is it nonetheless foreclosed, as held below, when the purpose proffered by the State is a declared purpose stated in the legislation itself?[13] Even if

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[12] An issue that arguably did not arise in *Bacchus* because the purpose was said to be "undisputed." *See Bacchus*, 468 U.S. at 271.

[13] If a direct challenge to purpose is still viable, then there is the question what evidence may be used to support such a challenge. If the plaintiff is confined to the formally enacted text of the legislation (on the principle, largely from cases concerning statutory interpretation, that only the agreed text

the precedents to the contrary,[14] from another era, are not to be sustained, should an exception be made for the circumstances in this case where the legislature has supplied advance findings to pre-determine "effect" as well? Without such an exception, a legislature can make bullet-proof its discrimination against the commerce of other States. Apart from their relation to the availability of a purpose challenge, do such legislative findings foreclose

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can be said to represent the will of all legislators), then a carefully crafted declared purpose and legislative findings (however counterfactual), all of which are by definition part of the formal text, may be easily used, as here, to pre-empt such a challenge. Application of this principle in a Commerce Clause setting leaves enforcement of the Clause to the political branches of a single State where, however, there is no " 'political check,' " *Washington v. United States*, 460 U.S. 536, 545 (1983) (tendential quotation marks), representing the interests of the remaining 49 States.

[14] *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) ("One challenging the validity of the state enactment on the grounds that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose"); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426-27 (1936) (reconfirming that, in *Foster-Fountain*, the "ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose" was otherwise); *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64, 73 (1904) (under Commerce Clause, "Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein" (quoting syllabus)); *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 259-60 (1919) (under Commerce Clause, plaintiff may prove that "the tax is a disguised attempt to tax interstate commerce").

an "effect" challenge? What level of scrutiny should be applied to such legislative findings under the Interstate Commerce Clause?[15]

C. The Conflict also Points up a Split among the Circuits over How to Weigh Purpose when Deciding Twenty-First Amendment Immunity.

This case presents the further issue how purpose, however established, is to be weighed when assessing an assertion of Twenty-First Amendment immunity. Here, there is a Circuit split as well as a High State court split.

In *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994), the Fifth Circuit first conducted what it called a "traditional Commerce Clause" analysis, *see Cooper*, 11 F.3d at 554, and concluded that portions of the Texas Alcoholic Beverage Code were in violation of the Clause, *see id.* at 552-54, before taking up the Texas defendants' "alternative argument [that,] even if the statutes violate traditional Commerce Clause principles, the Twenty-first Amendment imbues the States with carte blanche authority to manage the flow of alcohol within their borders," *see id.* at 554. This alternative argument was ultimately rejected because "The core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination

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[15] Despite various formulations, *see, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 n.15 (1977) ("careful scrutiny"); *Freeman v. Hewit*, 329 U.S. 249, 253 (1946) ("carefully scrutinized"), an arguably still unresolved issue as applied to legislative findings. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 476 n.2 (1981) (per Powell, J.)

animating the Commerce Clause." *See id.* at 555. *Ivey* and *McKesson*, the Florida Supreme Court decisions rejecting the import approach and the local agricultural content requirement, may be aligned with *Cooper* on this issue. *See Ivey*, 541 So. 2d at 1135-40; *McKesson*, 524 So. 2d at 1009.[16]

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[16] *See generally 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351-52 (1987) (legislature's bare "statement" of purpose, without evidentiary support, would not suffice for 21st Amendment immunity); *Capital Cities*, 467 U.S. at 714-16 (examining record for purpose state law "designed principally to further" and district court findings on actual effect to assess "nature" and "substantiality" of stated 21st Amendment interests); *Midcal*, 445 U.S. at 110-14 ("careful scrutiny" to stated 21st Amendment purposes and whether there was a cause-and-effect "correlation" "supported by the evidence"); *Kendall-Jackson Win., Ltd. v. Branson*, 82 F. Supp. 2d 844, 865-67 (N.D. Ill. 2000) (whether "advances" 21st Amendment interest; "how . . . discrimination . . . advances this objective"; "discrimination has not been shown to advance any legitimate purpose"); *Pete's*, 19 F. Supp. 2d at 1018-20 (whether "evidence" shows that State law "promotes" 21st Amendment purpose; "as a matter of fact" no such "purpose" or "effect"; whether "accomplishes any of these objectives"; "advance is so insubstantial that it is clearly outweighed by important federal objectives"); *Indiana Wholesale*, 662 N.E.2d at 969-71 (looking for a "showing that [State law] here serves its purported interests"; finding asserted "premise" to be "unsubstantiated"); *Loretto*, 601 F. Supp. at 862-64 (examining whether State law in fact advanced 21st Amendment interest); *Rice*, 21 Cal. 3d at 451-59, 579 P.2d at 490-95 (examining evidence and legislative history to determine "what policies are furthered by" State statute at issue; "whether [provisions] clearly vindicate those policies," including whether they "do" in fact "promote" "declared purpose"); *Heublein, Inc. v. Department of Alc. Bev. Cont.*, 237 Va. 192, 198-99, 376 S.E.2d 77, 80 (1989) (examining "legislative background" to find purpose of economic protectionism even in absence of any such "avowed

In *Kronheim*, the D.C. Circuit treated the plaintiff's showing of discrimination and the defendant's proffered justification as presenting a case of "mixed motive." *Milton S. Kronheim & Co. v. District of Colombia*, 91 F.3d 193, 203 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). In such a case, according to the *Kronheim* court, the Twenty-First Amendment concern, called an untainted motive, is given all weight, to the exclusion of the "tainted motive." *Id.* at 203-04. In the present case, the Georgia legislature purported to "find[ ]" that

> the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state.

See Ga. L. 1985 at p. 665, § 1; *see also Heublein*, 256 Ga. 578, 351 S.E.2d at 195. Petitioners demonstrated that the finding was false, on its face and otherwise.[17] The *Ivey* court likewise disputed the counterpart legislative finding in that case:

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purpose"; whether State law "will promote" asserted 21st Amendment purpose); *see also North Dakota v. United States*, 495 U.S. 423, 432-33 & n.5 (1990) (both four-Justice plurality and four-Justice partial dissent examine evidence to assess substantiality of stated 21st Amendment interests and whether State law was necessary to bring about desired result).

[17] For instance, there is no cost whatsoever, let alone "greater" cost, associated with "regulating and administering the manufacture [of] imported alcohol" because Georgia does not ever regulate or administer the manufacture of beverages produced out-of-state. *See also* Appendix at Q63-Q81.

> Further, the premise that the costs of regulating and administering imported alcoholic beverages are greater than those for domestic alcoholic beverages *is erroneous*. It is clear from the record that it actually costs less on a per gallon basis to regulate and administer imported alcoholic beverages than it does to regulate and administer alcoholic beverages manufactured in state.

Ivey, 541 So. 2d at 1138. Respondents in the instant case responded that, even if the "per gallon" or per liter cost is less for out-of-state beverages, the legislative finding was nonetheless literally true because the total cost of regulating out-of-state beverages is greater – for the simple reason that the total volume of out-of-state beverages is greater. Further, the purpose of defraying, through double taxation, this total cost (even though far in excess of the total cost and in a discriminatory manner) was said to be within the purpose of the Twenty-First Amendment. Finally, as applied in this case, the *Kronheim* approach meant that this asserted Twenty-First Amendment purpose – however insubstantial, specious, and inherently discriminatory – would prevail over blatant discrimination.

The Seventh Circuit has recently proposed an altogether different approach in *Bridenbaugh v. Freeman-Wilson*, Nos. 00-1044 & 00-1046, 2000 U.S. App. LEXIS 22991 (7th Cir. Sept. 13, 2000). Eschewing all analysis of purpose as "unilluminating," the *Bridenbaugh* court in effect declined to "follow the Supreme Court" and developed instead a test of "functional discrimination," said to be derived from "the text and history of the Constitution." *Bridenbaugh*, 2000 U.S. App. LEXIS 22991, at 10-11, 17. The *Bridenbaugh* court understood the *Brown-Forman*

and *Bacchus* cases as applying "an unconstitutional-conditions approach" to Twenty-First Amendment immunity. *Id.* at 16. Under its functional discrimination test (arguably a test of pure effect), the court examined whether the State had "used its power to impose a discriminatory condition on importation, one that favors [in-state] sources of alcoholic beverages over sources in other states." *Id.* at 17.

D. This Case also Presents the Important Question Whether the Twenty-First Amendment Affords Immunity to the States for their Violations of the Foreign Commerce Clause.

As noted, a GATT Panel determined in March 1992 that Georgia's 1985 Statute – with its double taxation for beverages (not using "Georgia grown products"), not only of other-state, but also of foreign origin, *see* Ga. L. 1985 at p. 665, § 2, *codified at* O.C.G.A. § 3-4-60 – violates the principle of nondiscrimination in international law. Because the United States defended with the Twenty-First Amendment, the Panel addressed whether the Amendment afforded immunity for this violation and concluded that it did not. *See, e.g.*, GATT Panel Decision ¶¶ 5.45 to 5.48. In the present case, by contrast, Twenty-First Amendment immunity was upheld as to Petitioners' Foreign Commerce Clause claims. The question is thus presented whether, in light of the structure of the Federal Constitution and the "more rigorous and searching scrutiny" afforded such claims,[18] the Twenty-First

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[18] *South-Central*, 467 U.S. at 100; *accord Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979) ("more extensive

Amendment provides any immunity to the States for their violations of the Foreign Commerce Clause.

CONCLUSION

This case presents a direct conflict, between Georgia and Florida, over the viability of the "import" approach after *Bacchus*. The conflict also points up a split among the Circuits over Twenty-First Amendment immunity. The case also presents the important question whether the Twenty-First Amendment affords immunity to the States for their violations of the Foreign Commerce Clause. More important than all of these issues, after more than a decade of litigation, multiple court challenges in State and Federal court, and repeated legislative initiatives, there is no other recourse for Petitioners or the 49 other States to bring Georgia into compliance after *Bacchus*.

Respectfully submitted,

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constitutional inquiry is required"); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 185 (1983) ("additional scrutiny required").

No. _____

In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; JIM BEAM BRANDS CO.; BROWN-FORMAN CORPORATION; DAVID SHERMAN CORPORATION; REMY AMERIQUE, INC.; and SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers,

Petitioners,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

VOLUME I

A. Final Order (filed May 21, 1998) in Civil Action File Nos. E-3793 & E-25073 by the Superior Court of Fulton County, State of Georgia..... A1

B. Minute Order (dated June 30, 2000) in Case No. S00A1357 by the Georgia Supreme Court..... B1

C. Order (filed Mar. 1, 1994) in Civil Action File No. E-3793 by the Superior Court of Fulton County, State of Georgia..... C1

D. Order (filed April 7, 1993) in Civil Action File No. E-3793 by the Superior Court of Fulton County, State of Georgia D1

E. Order (filed July 28, 1995) in Civil Action File Nos. E-3793 & E-25073 by the Superior Court of Fulton County, State of Georgia..... E1

F. Order (filed June 17, 1997) in Civil Action File Nos. E-3793 & E-25073 by the Superior Court of Fulton County, State of Georgia..... F1

G. Order on Defendants' Motion to Quash Subpoena (filed June 17, 1997) in Civil Action File Nos. E-3793 & E-25073 by the Superior Court of Fulton County, State of Georgia G1

H. Interstate and Foreign Commerce Clause, Article I, Section 8, clause 3 ..... H1

I. Due Process Clause of the Fourteenth Amendment, Amendment XIV, Section 1..... I1

J. Equal Protection Clause of the Fourteenth Amendment, Amendment XIV, Section 1..... J1

K. Import Export Clause, Article I, Section 10, clause 2..... K1

TABLE OF CONTENTS – Continued

Page

L. Supremacy Clause, Article VI L1

M. Amendment XXI M1

N. Complaint in Civil Action File No. E-3793 in the Superior Court of Fulton County, State of Georgia N1

Exhibit A to Appendix N: Refund Statute, O.C.G.A. § 48-2-35 .....N19

Exhibit B to Appendix N: 1992 Act.....N21

Exhibit C to Appendix N: Administrative Application N30

Exhibit W to Appendix N: The 1985 Statute, O.C.G.A. § 3-4-60 .....N35

Exhibit X to Appendix N: The Pre-1985 Statute.....N36

Exhibit Y to Appendix N: The Fallback Constitutional Statute.....N37

Exhibit Z to Appendix N: The 1985 Statute, Ga. L. 1985 at p. 665.....N41

O. Verified First Amendment to Complaint in Civil Action File No. E-3793 in the Superior Court of Fulton County, State of Georgia O1

P. Verified Second Amendment to Complaint in Civil Action File No. E-3793 in the Superior Court of Fulton County, State of Georgia P1

VOLUME II

Q. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment in Civil Action File Nos. E-3793 & 25073 in the Superior Court of Fulton County, State of Georgia..... Q1

TABLE OF CONTENTS – Continued

Page

R. Plaintiffs' Letter Brief (dated April 2, 1998) to the Honorable Alford J. Dempsey, Jr., Judge of the Superior Court of Fulton County, State of Georgia R1

S. Plaintiffs' Letter Brief (dated April 10 1998) to the Honorable Alford J. Dempsey, Jr., Judge of the Superior Court of Fulton County, State of Georgia S1

T. Brief of Plaintiffs/Appellants in Case No. S00A1357 in the Georgia Supreme Court T1

U. Appellants' Opposition to Motion to Dismiss in Case No. S00A1357 in the Georgia Supreme Court U1

APPENDIX A

IN THE FULTON COUNTY SUPERIOR COURT

STATE OF GEORGIA

AGE INTERNATIONAL, INC., et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO. E-3793
v.	)	
STATE OF GEORGIA., et al.,	)	
Defendants.	)	
AGE INTERNATIONAL, INC., et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO. E-25073
v.	)	
STATE OF GEORGIA, et al.,	)	
Defendants.	)	

FINAL ORDER

(Filed May 21, 1998)

These cases are before the Court on Defendants' Motion for Summary Judgment and several related evidentiary motions. The primary issue in these actions, in which the Plaintiffs seek refunds of distilled spirits taxes already collected by the State, is whether a state may impose an import tax on alcoholic beverages without violating the Interstate Commerce Clause of the United States Constitution, if such tax is designed to carry out a legitimate purpose under the Twenty-First Amendment to that Constitution. Defendants contend that these cases

present a legal question for determination by the Court, while the Plaintiffs contend that the Court must conduct a trial on factual issues in order to resolve these cases.

To prevail on summary judgment under O.C.G.A. §9-11-56, the moving party must demonstrate that there is no genuine issue of material fact, and that the facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. Defendants must demonstrate that the facts that exist without substantial controversy warrant an affirmative ruling as to those legal issues currently before the court. O.C.G.A. §9-11-56(d).

Defendants' burden as the moving party may be discharged by piercing the allegations of the complaint and establishing as a matter of law that the plaintiff could not recover under any theory fairly drawn from the pleadings and the evidence. *Holiday Inn, Inc. v. Newton*, 157 Ga. App. 436, 278 S.E.2d 85 (1981). The non-moving party must then point to specific evidence giving rise to triable issues. *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991). Conclusory allegations are insufficient, in the absence of substantiating facts or circumstances, to raise a material issue for trial. *Sherwood v. Boshears*, 157 Ga. App. 542, 278 S.E.2d 124 (1981). If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56 (e).

Having reviewed the record, including the pleadings, briefs and affidavits, and having listened to oral argument, the Court hereby **GRANTS** Defendants' motions for the reasons that follow:

A. FINDINGS OF FACTS

Construing the facts herein, and all reasonable inferences drawn therefrom, most favorably to the non-moving party, the court finds that the following material facts exist without substantial controversy:

1.

In 1985, the Georgia Legislature repealed the 1938 version of O.C.G.A. § 3-4-60 and enacted a new system for the taxation of alcoholic beverages sold or consumed within this State. Under the new law, two distinct taxes are imposed: an excise tax upon the first sale, use, or final delivery of distilled spirits and alcohol in Georgia and, the disputed tax in the instant cases, a tax upon the importation for use, consumption, or final delivery in Georgia of distilled spirits and alcohol. See Ga. Laws 1985, p. 665, O.C.G.A. § 3-4-60(2).

In the 1985 Act, the General Assembly stated that this Act's purpose was "to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; [and] to promote temperance. . . . " Ga. Laws 1985, p. 665. The Legislature also made explicit findings regarding the greater costs to the State of regulating and administering the distribution of imported distilled spirits, alcohol, and wine. *Id.*

2.

Plaintiff Heublein, Inc., immediately challenged the 1985 Act on Commerce Clause, due process, and equal

protection grounds. This Court and the Georgia Supreme Court rejected plaintiff's arguments and upheld the constitutionality of the 1985 Act, and the U.S. Supreme Court dismissed the subsequent appeal. *Heublein, Inc. v. State of Georgia,* Civil Action No. D-20634 (Fult. Super. Sep. 23, 1985), *aff'd,* 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed,* 483 U.S. 1013 (1987).

Plaintiffs Heublein, Inc., Jim Beam Brands Co., (f/k/a James B. Beam Distilling Co.) and Joseph E. Seagram & Sons, Inc., then filed three suits for refund, one in this Court and two in Dekalb Superior Court, for taxes paid under the 1938 liquor tax statute. Although the Georgia Supreme Court held the 1938 statute invalid in Beam's refund action, the Supreme Court also held that liquor manufacturers lack standing to obtain a refund from the State of alcohol taxes which they have already recovered from their Georgia wholesalers. *James B. Beam Distilling Co. v. State of Georgia,* 259 Ga. 363, 382 S.E.2d 95 (1989) (holding the 1938 statute unconstitutional, but applying the ruling prospectively), *rev'd & remanded for consideration of remedial issues,* 501 U.S. 529, 115 L.Ed.2d 481, 111 S.Ct. 2439 (1991) (holding the 1938 tax retroactively invalid, but protecting the State's right to raise procedural bars and defenses to the refund claim), *remedial issues decided on remand,* 263 Ga. 609, 437 S.E.2d 782 (1993) (holding that the manufacturer lacked standing to obtain a refund, and that due process is not violated thereby), *cert. denied,* 513 U.S. 1056, 130 L.Ed.2d 597, 115 S.Ct. 662 (1994).

3.

Those same three plaintiffs, together with additional out-of-state liquor manufacturers, jointly filed the two instant cases, again seeking to challenge the constitutionality of O.C.G.A. § 3-4-60(2) (1985), and seeking a refund of $96,000,000, plus interest, for liquor stamps allegedly purchased from the Revenue Department during 1989 to early 1992 (Civil Action No. E-3793) and during early 1992 through January 31, 1993 (Civil Action No. E-25073).

4.

Each of the Plaintiffs already has collected the taxes they seek from the State herein from their designated Georgia wholesalers, by separately billing the wholesalers for "state stamps," "state tax," or the like.

5.

In reliance on the validity of the 1985 Act, the State expended the tax revenues in question to benefit both the Plaintiffs and its citizens. Through such expenditures, the State sought to regulate and control alcoholic beverages generally, to provide exclusive marketing territories in Georgia for Plaintiffs and their brands, to protect consumers and Plaintiffs' brands against bootleg and contraband products and sales, and to provide other governmental benefits and services.

6.

The State incurs greater expenses in regulating imported alcoholic beverages than domestic alcoholic beverages.[1] Furthermore, this Court is bound by the Georgia Supreme Court's determination, in its prior opinion resolving the *Heublein* litigation, that O.C.G.A. § 3-4-60(2) implicates central concerns of the Twenty-first Amendment by "defraying the increased costs of regulating the importation into this state of intoxicating liquors." *Heublein*, supra at 584-585.

7.

Defendants timely filed a motion for summary judgment, with supporting affidavits. In opposition to that motion, Plaintiffs submitted affidavits and documents to support their contention that these cases should be tried. Defendants have objected to certain documents and affidavits relied upon by Plaintiffs in reply to this summary judgment motion.

8.

For the reasons set out herein, after viewing the facts in a light most favorable to the Plaintiffs, the Court finds that there is no genuine issue as to any material fact.

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[1] "[I]t is axiomatic that a state may better police, regulate and control alcoholic beverages produced within its borders than that which is imported from other states, and that a cost differential exists with regard to the control and administration of the vast quantities of alcoholic beverages imported into this State." *Heublein*, supra at 584.

Therefore, the constitutional issues presented by these cases involve questions of law which can best be resolved by summary judgment.

B. CONCLUSIONS OF LAW

1.

In *Heublein*, supra, O.C.G.A. § 3-4-60(2) was upheld against Commerce Clause, equal protection, and due process challenges. Under the doctrines of *res judicata* and collateral estoppel, the judgment and decision in that case operate to bar Plaintiff Heublein, Inc.'s effort to litigate this same matter again. See, e.g., O.C.G.A. § 9-12-40 (barring relitigation of "all matters put in issue or which under the rules of law might have been put in issue" in the former case); *Danzell v. Cannon*, 224 Ga. App. 602, 603, 481 S.E.2d 588, 589-90 (1997); *Langton v. Department of Corrections*, 220 Ga. App. 445, 446, 469 S.E.2d 509, 510 (1996); *Williams v. Summit Psychiatric Centers. P.C.*, 185 Ga. App. 264, 267, 363 S.E.2d 794, 797 (1987).

2.

With regard to the other Plaintiffs in the instant cases, the *Heublein* decision operates as *stare decisis*, thereby barring the other Plaintiffs' challenge. See GA. CONST. OF 1983, Art. VI, Sec. VI, Par. VI; *Cobb v. State*, 187 Ga. 448, 452, 200 S.E. 796, 798 (1939); *Grantham v. State*, 151 Ga. App. 707, 261 S.E.2d 445, 446 (1979) ("Once a constitutional question has been finally and conclusively determined by the Supreme Court, in later cases raising the same question, the courts merely apply the holding of the Supreme Court"), *aff'd*, 244 Ga. 775, 262 S.E.2d 777 (1979).

Here, just as in *Heublein*, the Plaintiffs ostensibly attack the validity of O.C.G.A. § 3-4-60(2) under the Interstate Commerce Clause of the federal Constitution. However, any consideration of a challenge to a State statute involving alcoholic beverages necessarily begins with the Twenty-first Amendment, section two of which states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

a.

In *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 62-63, 81 L.Ed. 38, 40-41, 57 S.Ct. 77, 78-79 (1936), the U.S. Supreme Court expressly upheld a state's discriminatory import fee on alcoholic beverages under the Twenty-first Amendment, noting that a state may either ban all imports or "discourage importation by laying a heavy impost" or a "heavy importation fee."

"The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299-300, 65 S.Ct. 661, 89 L.Ed. 951, 956-57 (1945) (Frankfurter, J., concurring). Thus, the U.S. Supreme Court has noted that such Amendment limits the effect of the dormant Commerce Clause and grants the States virtually complete control over the importation of liquor into their territory. See e.g., *North Dakota v. United States*, 495 U.S. 423, 431-32, 110 S.Ct. 1986, 1992-93, 109 L.Ed.2d 420, 430-31 (1990); *Heublein, Inc. v. South Carolina Tax Comm'n*,

409 U.S. 275, 283, 93 S.Ct. 483, 489, 34 L.Ed.2d 472, 479 (1972); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346, 84 S.Ct. 1247, 1250, 12 L.Ed.2d 362, 366 (1964); *United States v. Frankfort Distilleries*, 324 U.S. at 299-301, 65 S.Ct. at 664-65, 89 L.Ed. at 956-57; *Carter v. Virginia*, 321 U.S. 131, 137, 64 S.Ct. 464, 468, 88 L.Ed. 605 (1944); *Duckworth v. Arkansas*, 314 U.S. 390, 398-99, 62 S.Ct. 311, 315, 86 L.Ed. 294, 299 (1941) (Jackson, J., concurring); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398, 59 S.Ct. 256, 257, 83 L.Ed. 246, 249 (1939).

b.

In *Heublein, Inc. v. State of Georgia*, supra, the Georgia Supreme Court traced the history of the decisions under the Twenty-First Amendment, and, echoing the decision in *Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263, 82 .Ed.2d 200, 104 S.Ct. 3049 (1984), held that when a central concern of the Twenty-first Amendment is implicated, that Amendment controls competing Commerce Clause concerns. *Heublein*, 256 Ga. at 578-85, 351 S.E.2d at 191-96. Accord *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712-15, 104 S.Ct. 2694, 2707-09, 81 L.Ed.2d 580, 597-99 (1984); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1468, 137 L.Ed.2d 681 (1997).

As the Georgia Supreme Court noted in *Heublein*, the Hawaiian legislature made no effort to suggest that the statute challenged in *Bacchus* advanced any purpose recognized under the Twenty-first Amendment. Here, in stark contrast to that statute and its acknowledged purpose, Georgia's statute specifically addresses multiple

concerns central to the Twenty-first Amendment. For example, O.C.G.A. § 3-4-60(2) provides for the increased cost of administration and collection of revenues, aids in the exercise of the police power, and promotes temperance. See Ga. Laws 1985, p. 665. The Act also contains express legislative findings indicating that the legislation was designed to carry out central Twenty-first Amendment purposes, including a finding that the State's costs for regulating and administering imported alcoholic beverages is greater than for nonimports. *Id.*

c.

Notwithstanding the Georgia Supreme Court's resolution of the *Heublein* litigation, Plaintiffs in the instant case seek to challenge O.C.G.A. 3-4-60(2) under the Commerce Clause by alleging that the statute was enacted pursuant to illicit protectionist motives. Although such efforts might seem to offer an unexplored avenue for challenging the statute, the Court finds that, as a practical matter, the determinations of this Court and the Georgia Supreme Court in the *Heublein* litigation dispel any constitutional infirmities concerning this statute. *Heublein*, supra at 584-585. Accordingly, this court will not strike down an *otherwise constitutional* statute on the basis of an alleged illicit legislative motive. See, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672, 683-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211, 222 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-70 & n. 7, 471 n. 15,

101 S.Ct. 715, 723-27, 66 L.Ed.2d 659, 668-73 (1981) ("We will not invalidate a state statute . . . merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry"); *State v. Miller*, 260 Ga. 669, 672 n.3, 398 S.E.2d 547, 551, n.3 (1990) ("While the court will often consider legislative motives or purposes in interpreting a statute, '[i]t is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of [legislators] said about it' "); *World Famous Dudley's Food & Spirits Inc. v. City of College Park*, 265 Ga. 618, 621, 458 S.E.2d 823 (1995) (Fletcher, P.J., concurring). See also *City of Calhoun v. North Georgia Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975) and *Tripp v. Martin*, 210 Ga. 284, 79 S.E.2d 521 (1954) (Supreme Court will not inquire into motives of the General Assembly in enactment of legislation).

In addition, courts afford great deference to legislative findings. *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993) (It is proper for courts to pay particular deference to reasonable legislative judgments); *appeal after remand* 264 Ga. 150, 442 S.E.2d 446 (1994). "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist; and therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them." *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 369-72, 3 S.E.2d 705, 712-13 (1939).

d.

In *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1468, 137 L.Ed.2d 681 (1997), a statute enacted by the District of Columbia, which purportedly discriminated against imported alcohol, was challenged under the Commerce Clause. As in the instant cases, the plaintiff in *Kronheim* alleged an improper protectionist motive. The *Kronheim* court analyzed the competing Twenty-first Amendment and Commerce Clause concerns and concluded that it was *legally irrelevant* if there were an improper protectionist purpose, as long as a legitimate Twenty-first Amendment purpose was also possible. Concluding that such a purpose was possible, the court upheld the statute. *Kronheim*, supra at 203-204.

Here, just as in *Kronheim*, the General Assembly's stated legislative purposes and findings reasonably fall within powers delineated by the Twenty-first Amendment. Therefore, following the reasoning of the *Kronheim* court, the Court finds that the General Assembly stated valid legislative purposes to support O.C.G.A. § 3-4-60 under powers granted this state by the Twenty-first Amendment, and that such purposes prevail in spite of competing Commerce Clause concerns.[2] In light of such a

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[2] Neither plaintiffs' counsel nor this Court has uncovered *any* authority that suggests that, where valid Twenty-first Amendment purposes have been articulated within a legislative act, such purposes may still yield to the competing Commerce Clause interests. Only in *Bacchus*, where *no* legitimate Twenty-first Amendment concern was articulated, did such a challenge prevail. To rule otherwise today, or to further announce the quantum of proof by which an alleged illicit motive must

finding, whether any individual legislator had a different motive or whether the legislative findings are, in fact, correct, remain irrelevant. *O'Brien*, supra; *Beach*, supra; *Clover Leaf Creamery Co.*, supra.

4.

Plaintiffs' equal protection, due process, Supremacy Clause, Import-Export Clause, and Georgia constitutional arguments are disposed of by, *inter alia*, the decision in *Heublein*, the Twenty-first Amendment and the decisions thereunder discussed above, and by the Georgia Constitution. See U.S. CONST., TWENTY-FIRST AMEND., Sec. 2; GA. CONST. OF 1983, Art. III, Sec. VI, Par. VII; 19 U.S.C. § 3512(b)(2)(A); *Heublein, Inc. v. State of Georgia*, supra; *House of Seagram, Inc. v. State Liquor Authority*, 292 N.Y.S.2d 183 (N.Y. App. 1968) (tax on liquor which comes to rest in taxing state does not violate Import-Export Clause), *aff'd*, 303 N.Y.S.2d 880 (N.Y. 1969), *cert. denied*, 396 U.S. 121, 90 S.Ct. 396 (1969).

5.

Plaintiffs lack standing to obtain a refund from the State of the taxes in question, because they have already recovered them from the liable parties, *i.e.*, the Georgia wholesalers. *James B. Beam Distilling Co. v. State of Georgia*,

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outweigh legitimate Twenty-first Amendment concerns in order to bring a Commerce Clause challenge, clearly would be beyond the province of this Court.

263 Ga. at 611, 437 S.E.2d at 784 (1993), *cert. denied*, 513 U.S. 1056 (1994). Additionally, plaintiffs' claims for equitable relief are unsupported, as well as negated by the State's own reliance interests and competing equitable concerns.

6.

Plaintiffs have no viable claims under 42 U.S.C. § 1983, as such actions are barred in state courts when adequate procedural remedies are provided by the state. See, e.g. *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976). See also *Age International, Inc. v. Miller*, 830 F. Supp. 1484 (N.D. Ga. 1993) (state procedural remedies trigger the Tax Injunction Act and bar federal district court jurisdiction over actions for refund of state taxes), *aff'd* 37 F.3d 637 (11th Cir. 1994).

Similarly, Plaintiffs' claims asserted under alternative state law theories of action and against the Defendants in their individual capacities are barred by the doctrines of sovereign and official immunity. See GA. CONST. OF 1983, Art. I, Sec. II, Par. IX(d) and Par. IX(e); OCGA § 50-20-21 et. seq.; *Clark v. State*, 240 Ga. 188, 240 S.E.2d. 5 (1977).

7.

Finally, Defendants have objected to certain evidentiary materials submitted by Plaintiffs in opposition to the Motion for Summary Judgment and throughout this case, *i.e.*, to certain informal audio recordings, and the edited transcripts thereof, which purportedly contain selected

statements by unidentified former legislators; to various privileged and unauthenticated documents; and to portions of affidavits filed by Plaintiffs. Concomitantly, Plaintiffs have asked the Court to reconsider its prior rulings on the inadmissibility of certain privileged and unauthenticated documents; and Plaintiffs have requested that Defendants file certain "original discovery."

Consistent with the discussion in part 3(d) of this order, the Court finds that evidence relating to Plaintiffs' continuing attempts to reveal illicit legislative motives is irrelevant. The legitimate Twenty-first Amendment concerns articulated within the statute itself, and noted by both this Court and the Georgia Supreme Court in *Heublein*, supra, require that any Commerce Clause challenge yield to these Twenty-first Amendment concerns.

Accordingly, the Court sustains Defendants' objections and grants the motion to strike the audiotapes and transcripts thereof, and the other identified items in Defendants' written objections, Table, and motions to strike dated October 27, 1997 and December 19, 1997. Additionally, the Court denies Plaintiffs' motion for reconsideration of the "proffered exhibits" and sustains Defendants' objections to Plaintiffs' requests for Defendants to file the original audiotapes.

C. CONCLUSION

The Court finds that there is no genuine issue of material fact and that Defendants are entitled to judgment on Plaintiffs' Complaints as a matter of law. Accordingly, the Court **GRANTS** Defendants' Motion for

Summary Judgment on all claims articulated in each of these cases. Pursuant to O.C.G.A. § 9-11-54, the Court directs entry of final judgment in favor of the Defendants on Plaintiffs' Complaints in the above-styled actions.

SO ORDERED, this 21 day of May, 1998.

/s/ Alford J. Dempsey, Jr.
ALFORD J. DEMPSEY, JR.,
JUDGE
FULTON COUNTY
SUPERIOR COURT
ATLANTA JUDICIAL
CIRCUIT

APPENDIX B

(SEAL) **SUPREME COURT OF GEORGIA**
Case No. S00A1357

Atlanta June 30, 2000

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

AUSTIN, NICHOLS & COMPANY, INC., et al. v. STATE OF GEORGIA et al.

Upon consideration of the Motion to Dismiss filed in this case, it is ordered that this appeal be hereby dismissed.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta
(SEAL)

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb,
Chief Deputy Clerk

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AGE INTERNATIONAL, INC., et al.

v.

STATE OF GEORGIA, et al.

CIVIL ACTION FILE

No. E-3793

ORDER

(Filed Mar. 1, 1994)

This case came before the Court on the Plaintiffs' Motion to Compel Discovery, the Court having heard the argument of counsel and considered the pleadings filed by the parties, and good cause having been found, it is hereby ORDERED as follows:

Plaintiffs' Motion to Compel production of documents pursuant to Plaintiffs' First Document Requests numbered 10, 12, 13, 30, 31, 35, and 37 is, with respect to the legislative intent and purpose behind the wine tax statute, O.C.G.A. § 36-50 from June 1, 1984 through March 22, 1993 Granted, such production to be limited to the State Revenue Commissioner's general files relating to legislation; the files of the person or persons within the Governor's office with substantive responsibility for legislation associated with State wine taxes; and (excluding work product and privileged documents) files of the Department of Law.

The Plaintiffs' Motion to Compel production of documents pursuant to Plaintiffs' First Document Request No.

18 is Granted as follows: such production shall be limited to either statistical data or appropriately redacted documents showing the actual protests, if any, of the payment of distilled spirits taxes during 1989 as to which any refunds were actually granted. Information that may be redacted may include dollar amounts, names, addresses, identity of the taxpayer or its representatives or its products, or anything else indicating the identity of any taxpayer.

In light of the Court's above rulings the Plaintiffs have withdrawn the remainder of their Motion to Compel, and Plaintiffs will not refile or further pursue their Motion if the Defendants produce the documents, if any, required by this Order.

Nothing contained herein shall be construed to affect or override the parties' prior negotiations and consensual understanding and agreement with respect to any of the document requests contained in the Plaintiffs' First Document Requests. Nothing contained herein shall require the production of any privileged documents. In the case documents as to which Defendants assert a "governmental deliberations privilege", the Defendants shall specifically identify such documents so as to enable the Court, if necessary, to determine the applicability of any such privilege. The same identification duty shall apply to any close questions with respect to the applicability of the attorney/client privilege to a particular document.

SO ORDERED, this 1st day of March, 1994.

/s/ Frank M. Hull
Frank M. Hull, Judge
Superior Court of
Fulton County

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AGE INTERNATIONAL, INC.; AUSTIN, NICHOLS & CO., INC.; BACARDI IMPORTS, INC.; THE BLACK PRINCE DISTILLERY, INC.; BROWN-FORMAN CORP.; CARILLON IMPORTERS LTD.; DAVID SHERMAN CORPORATION; E. & J. GALLO WINERY; THE FLEISCHMANN DISTILLING COMPANY, a Division of Fourth Colchester, Inc. f/k/a Whitbread North America, Inc.; FOURTH COLCHESTER, INC., f/k/a Whitbread North America, Inc., in its own right and as successor to Buckingham Wile Co.; HEAVEN HILL DISTILLERIES, INC. HEIBLEIN, INC.; HIRAM WALKER & SONS, INC., in its own right and as successor to Hiram Walker Incorporated, also successor to Maidstone Wine & Spirits Inc., also successor to W. A. Taylor & Company; et al.,	)	CIVIL ACTION FILE NO. E-3793
Plaintiffs	)	
v.	)	
STATE OF GEORGIA, ZELL MILLER, individually and as Governor of the State of Georgia, MARCUS E. COLLINS,	)	

individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Defendants

ORDER

(Filed April 7, 1993)

This case came before the Court on the following Motions:

1. Defendants' Motion to Stay Discovery (filed August 27, 1992);

2. Defendants' Motion to Dismiss, or, in the Alternative, for Judgment on the Pleadings (filed September 4, 1992);

3. Plaintiffs' Motion Pursuant to O.C.G.A. § 9-11-12(b) and (c) to Exclude Extraneous Matters, or, in the Alternative, Pursuant to O.C.G.A. § 9-11-56(f) for an Opportunity to Take Discovery (October 16, 1992);

4. Defendants' Motion to Strike Plaintiffs' Evidentiary Submissions of October 16, 1992 (November 17, 1992);

5. Defendants' Motion to Strike Plaintiffs' Evidentiary submissions of January 8, 1993,

Namely, Exhibits "HH" Through "KK" (filed February 1, 1993); and,

6. Defendants' Objection and Motion to Strike Plaintiffs' Filing of Exhibits "LL", "MM", and "NN" (filed February 5, 1993).

The Court, having reviewed all of the pending Motions listed above, having heard oral argument of counsel, and having found good cause, enters the within Order, as follows.

I. DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS

In ruling upon a Motion to Dismiss under O.C.G.A. § 9-11-12(b)(6), all "facts alleged in the complaint must be taken as true." *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369, 372 (1977). Under O.C.G.A. § 9-11-12(b)(6), the "rules require that [the complaint] be construed in the light most favorable to the [nonmoving] plaintiff." *Morgan v. Georgia Vitrified Brick & Clay Co.*, 196 Ga. App. 779, 397 S.E.2d 49, 50 (1990). Moreover, "all doubts" must be resolved in [the plaintiff's] favor." *Tri-City Sanitation, Inc. v. Action Sanitation Serv., Inc.*, 227 Ga. 489, 181 S.E.2d 377, 378 (1971). Likewise, in ruling upon a motion for judgment on the pleadings under O.C.G.A. § 9-11-12(c), all allegations in the non-movant's pleading "are to be taken as true and all allegations made by the moving party "are taken as false". *Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49, 50 (1978). *See also, Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866, 870 (1975); *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263, 266 (1975).

The plaintiffs have alleged that O.C.G.A. § 3-4-60, as enacted in 1985, violates certain federal and state constitutional provisions. The defendants' Motion to Dismiss and Motion for Judgment on the Pleadings seek, *inter alia*, to raise a defense of collateral estoppel and res judicata, but both Motions refer to and rely on numerous matters outside the pleadings to support the Motions. Thus, the Court can not find that these Motions can be granted based on just the pleadings. In addition, the issues of collateral estoppel and res judicata can not be decided here without considering matters extraneous to the pleadings, which is not allowable on Motions to Dismiss or on Motions for Judgment on the Pleadings. The Court holds that, taking all of the allegations in the Complaint as true, the defendants have not carried their burden for dismissal or judgment at this juncture and some discovery is warranted in this case. Accordingly, the defendants' Motion to Dismiss, or, in the Alternative, for Judgment on the Pleadings is DENIED without prejudice to seek judgment as a matter of law at a later date. This Order is [sic] no manner rules on the merits of the defenses of collateral estoppel or res judicata.

II. DEFENDANTS' MOTION TO STAY DISCOVERY

Defendants have requested a stay of discovery pending resolution of Cross-Motions for Summary Judgment that were pending before this Court in *James B. Beam Distilling Co. v. State of Georgia, et al.*, Civil Action No. D-42527 and pending a resolution of the defendants' Motion to Dismiss. The Cross-Motions for Summary Judgment in the *Beam* case that were pending at the time

of defendants' Motion to Stay Discovery are no longer pending, and the defendants' Motion to Dismiss is now being denied. Accordingly, the defendants' Motion to Stay Discovery is DENIED as moot, and discovery may proceed in accordance with the Civil Practice Act.

III. PLAINTIFFS' MOTION PURSUANT TO O.C.G.A. § 9-11-12(b) AND (c) TO EXCLUDE EXTRANEOUS MATTERS, OR, IN THE ALTERNATIVE, PURSUANT TO O.C.G.A. § 9-11-56(f) FOR AN OPPORTUNITY TO TAKE DISCOVERY

The plaintiffs moved to exclude from the Court's consideration in ruling upon the defendants' Motion to Dismiss certain "Extraneous matters". In the alternative, the plaintiffs moved pursuant to O.C.G.A. § 9-11-56(f) for an opportunity to take discovery. In ruling upon the defendants' Motion to Dismiss, the Court did not consider the extraneous matters referenced in the defendants' Motion or in the plaintiffs' replies, but considered only the pleadings of record and the law. Accordingly, plaintiffs' Motion Pursuant to O.C.G.A. § 9-11-12(b) and (c) to Exclude Extraneous Matters, or, in the Alternative, Pursuant to O.C.G.A. § 9-11-56(f) for an Opportunity to Take Discovery is DENIED as moot.

IV. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' EVIDENTIARY SUBMISSIONS OF OCTOBER 16, 1992

V. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' EVIDENTIARY SUBMISSIONS OF JANUARY 8, 1993, NAMELY, EXHIBITS "HH" THROUGH "KK"; AND,

VI. DEFENDANTS' OBJECTION AND MOTION TO STRIKE PLAINTIFFS' FILING OF EXHIBITS "LL", "MM" AND "NN"

Because the Court considered only the pleadings and law in ruling upon defendants' Motion to Dismiss, defendants' Motion to Strike plaintiffs' Evidentiary Submissions of October 16, 1992; Defendants' Motion to Strike Plaintiffs' Evidentiary Submissions of January 8, 1993, Namely, Exhibits "HH" Through "KK"; and Defendants' Objection and Motion to Strike Plaintiffs' Filing of Exhibits "LL", "MM" and "NN" are pretermitted and there is no need to reach these issues until such later time, if any, as the evidence objected to is relied upon by a party.

SUMMARY

In summary,

1. Defendants' Motion to Stay Discovery (filed August 27, 1992 is DENIED as moot and discovery may proceed in accordance with the Civil Practice Act;

2. Defendants' Motion to Dismiss, or, in the Alternative, for judgment on the Pleadings (filed September 4, 1992) is DENIED;

3. Plaintiffs' Motion Pursuant to O.C.G.A. § 9-11-12(b) and (c) to Exclude Extraneous Matters, or, in the Alternative, Pursuant to O.C.G.A. § 9-11-56(f) for an Opportunity to Take Discovery (October 16, 1992) is DENIED as moot;

4. Defendants' Motion to Strike Plaintiffs' Evidentiary Submissions of October 16, 1992 (November 17, 1992)

is deemed moot or pretermitted by the ruling on the main Motion;

5. Defendants' Motion to Strike Plaintiffs' Evidentiary Submissions of January 8, 1993, Namely, Exhibits "HH" Through "KK" (filed February 1, 1993) is deemed moot or pretermitted by the ruling on the main Motion; and,

6. Defendants' Objection and Motion to Strike Plaintiffs' Filing of Exhibits "LL", "MM" and "NN" (filed February 5, 1993) is deemed moot or pretermitted by the ruling on the main Motion.

IT IS HEREBY ORDERED, this 7th/ day of April, 1993.

/s/ Frank M. Hull
FRANK M. HULL
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AGE INTERNATIONAL, INC.; AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; THE BLACK PRINCE DISTILLERY, INC.; BROWN-FORMAN CORPORATION; CARILLON IMPORTERS LTD.; DAVID SHERMAN CORPORATION; E. & J. GALLO WINERY; HEAVEN HILL DISTILLERIES, INC.; HEUBLEIN, INC.; HIRAM WALKER & SONS, INC.; JIM BEAM BRANDS CO.; JOSEPH E. SEAGRAM & SONS, INC.; THE PADDINGTON CORPORATION; REMY AMERIQUE, INC.; SAZERAC COMPANY, INC.; SCHIEFFELIN & SOMEREST CO.; SIDNEY FRANK IMPORTING COMPANY INC.; SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers; and WILLIAM GRANT & SONS, INC.,	:	Civil Action No. E-25073 (consolidated with Civil Action No. E-03793)
Plaintiffs,	:	
vs.	:	
STATE OF GEORGIA; ZELL MILLER, individually and as	:	

Governor of the State of Georgia :
MARCUS E. COLLINS, :
individually and as Georgia State :
Revenue Commissioner; and :
STEVEN N. MCCOY individually :
and as Director of Office of :
Treasury and Fiscal Services for :
the State of Georgia, :
:
Defendants. :
:

ORDER

(Filed Jul. 28, 1995)

BACKGROUND

This matter is before this Court on the following discovery motions:

1) Non-Party Movants' motion to quash and/ or motion for protective order; (filed 12/16/94)

2) Defendants' motion to limit discovery and for protective order; (filed 12/27/94)

3) Plaintiffs' motion to compel and request for extension of discovery; (filed 02/03/95) and

4) Defendants' motion to determine the sufficiency of response and request for admissions and to compel discovery. (filed 05/12/95)

The Court heard the arguments of these motions on June 23, 1995, has read the briefs submitted by the parties, and has reviewed the file in this case.

This action (along with Civil Action No. E-03793) arises out of Plaintiffs' claims for refund of liquor taxes in this challenge to the constitutionality of Georgia's liquor

tax statutes. Plaintiffs make a Commerce Clause challenge to O.C.G.A. § 3-4-60 as amended in 1985; they additionally make a constitutional challenge to the 1992 Act.

Plaintiffs have sought discovery from the Defendants and from non-party attorneys regarding the legislative history surrounding the 1985 liquor tax statute. Attached to the subpoenas to the non-parties were documents which Defendants claim are protected by privilege and which Plaintiffs inadvertently obtained.

NON-PARTY ATTORNEYS' MOTION TO QUASH AND/OR MOTION FOR PROTECTIVE ORDER; DEFENDANTS' MOTION TO LIMIT DISCOVERY; AND PLAINTIFFS' MOTION TO COMPEL AND MOTION TO EXTEND DISCOVERY

The four non-party attorneys ("Movants") represent clients involved in the manufacturing, sale and/or distribution of alcoholic beverages. These attorneys were involved in lobbying efforts with various State officials and others concerning legislation which would affect the interests of Movants' clients. Movants were served with deposition subpoenas seeking the production of documents which Plaintiffs contend relate to the legislative history surrounding the passage of the 1985 and the 1992 statutes.

The Court finds that these discovery requests seek information that is irrelevant and not calculated to lead to the discovery of admissible evidence. *See Primary Care Physicians Group, P.C. et al. v. Ledbetter, et al.*, 102 F.R.D.

254 (1984). The lobbying efforts of these nonparty attorneys are not relevant to the questions of the existence of a valid factor unrelated to protectionism and the absence of less discriminatory alternative to achieve the State's goal, which are the ultimate questions in this case. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S.Ct. 3049 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049 (1984); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434 (1977).

Accordingly, the Movants' motion to quash is hereby GRANTED. Plaintiffs may not discover from Movants information regarding their lobbying efforts on behalf of their clients nor may Plaintiffs discover any information protected by the attorney-client privilege or which is commercially confidential information. Movants shall produce all documents which do not relate to lobbying efforts and which are not privileged and shall appear at their depositions subject to the foregoing limitations. Plaintiffs' motion to extend the discovery period is hereby GRANTED. The discovery period will be extended three months from the date of this Order. The Court declines to award attorney's fees in connection with this motion.

MOTION FOR PROTECTIVE ORDER

Defendants' motion concerns Plaintiffs' attempt to depose the non-parties about certain documents which Defendants contend are privileged and which they claim inadvertently came into Plaintiffs' possession.

The Court finds that state law governs the issue of evidentiary privileges in this case. *See Federal Ins. Co. v.*

National Distributing Co., 203 Ga. App. 763 (1992). The attorney-client privilege protects some of the documents at issue. Plaintiffs claim that these documents were produced in the *Beam* litigation and that therefore Defendants have waived their privilege in this action. However, Defendants argue that the earlier production of these documents was inadvertent. Previous disclosure of privileged documents in discovery does not waive the privilege. *See Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497 (1981). The Court finds that Exhibits J, K and II are protected by the attorney-client privilege.

Documents which are prepared in anticipation of litigation will be protected by the work-product privilege if reasonable grounds exist to believe that litigation is probable. *See Lowe's of Georgia, Inc. v. Webb*, 180 Ga. App. 755 (1986). The privilege also applies to statements of witnesses taken by a party's agent. *See Warmack v. Mini-Skools, Ltd.*, 164 Ga. App. 737 (1983). The Court finds that the Exhibits L, M, EE, and FF were prepared in anticipation of a challenge to Georgia's alcohol import legislation after the *Bacchus* decision, which invalidated a Hawaii alcohol tax exemption. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984).

The Court finds that the term "secrets of state" as stated in O.C.G.A. § 24-9-21(4) means more than matters of national security, such as military and diplomatic information. *See Hardaway Co. v. Rives*, 262 Ga. 631 (1992). Exhibits U, V, W, X, Y, DD, and HH are pre-decisional documents of state employees regarding the proposed legislation which are protected by O.C.G.A. § 24-9-21(4).

For the foregoing reasons, Defendants' motion is hereby **GRANTED**. Plaintiffs shall not use and disseminate the privileged documents at issue.

MOTION TO DETERMINE SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSIONS AND TO COMPEL DISCOVERY RESPONSES

Defendants served each individual Plaintiff with a set of requests to admit and interrogatories requesting each Plaintiff to state and describe its individual claim for a refund. Defendants wanted to ensure by this discovery that each Plaintiff asserted an independent claim for a refund. Plaintiffs collectively filed one joint response which was a general denial of the requests. The Court finds that Plaintiffs' responses to Defendants' discovery are inadequate and insufficient. Plaintiffs shall specifically and directly respond to the requests to admit by either admitting or denying each request without merely providing narrative responses. *See* O.C.G.A. § 9-11-36. Each Plaintiff shall answer each of Defendants' interrogatories separately and fully in accordance with Section 33 (a) of the Civil Practice Act.

Accordingly, Defendants' motion is hereby **GRANTED**. Plaintiffs shall fully respond to the discovery within twenty (20) days of this order.

SO ORDERED this 28 day of July, 1995.

/s/ Alice D. Bonner
ALICE D. BONNER, JUDGE
Superior Court of Fulton
County

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AGE INTERNATIONAL, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION**
STATE OF GEORGIA, et al.,	)	**FILE NO: E-3793**
Defendants,	)	
AGE INTERNATIONAL, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION**
STATE OF GEORGIA, et al.,	)	**FILE NO: E-25073**
Defendants.	)	

ORDER

(Filed June 17, 1997)

Before the court are the following motions:

1. Plaintiff's Motion to Compel;

2. Motion of Non-Party Attorneys George D. Busbee and King & Spalding to Quash Subpoenas and for Protective Order;

3. Motion to Quash Plaintiffs' Subpoena to Former Legislator Lauren (Bubba) McDonald and for Protective Order;

4. Defendants' Motion for Protective Order and to Enforce this Court's July 28, 1995 Order Limiting Discovery and for Other Relief; and

5. Plaintiffs' Motion for Extension of Discovery.

I. PLAINTIFFS' MOTION TO COMPEL

Plaintiff contends that the following non-parties were served with Subpoenas Duces Tecum for Deposition, Notices to Produce, and Requests for Production of Documents: Dan E. White, Office of Dan E. White, J.R. Cullens, Office of J.R. Cullens, William I. Divine, Jr., Divine, Wilkin, Raulerson, Fields, Joseph R. Cullens, and Freeman & Hawkins ("non-party attorneys"); that the non-party attorneys filed a motion to quash and/or for Motion for protective order; and that Judge Bonner, in an order entered on July 28, 1995, granted the motion in part, but ordered the non-party attorneys to appear at the deposition and to produce documents. Mr. White appeared at a deposition on September 22, 1995, but refused to answer most questions and did not produce the documents. Plaintiffs seek an order (1) directing Dan White (and the Office of Dan E. White) to appear for deposition, to answer the questions already asked, to answer follow-up questions, and to produce documents; (2) overruling any and all advance objections based on blanket assertions of privilege or claims of protection; (3) holding that Plaintiffs may inquire, without limitation, into any witnesses' lobbying efforts, if the information sought is generally relevant to the general subject matter of this litigation and appears reasonably calculated to lead to the discovery of admissible evidence; (4) granting

an extension of discovery period; (5) and ordering Mr. White or his counsel to pay the Plaintiffs' reasonable expenses and attorneys' fees associated with Mr. White's September 22, 1995 deposition.

Plaintiffs contend that the lobbying efforts of the non-party attorneys are discoverable and relevant to the issue of whether the State's purposes behind the legislation were legitimate. Defendants and the non-parties respond that Judge Bonner's order already ruled on this exact issue, that their testimony is irrelevant, and that they are incompetent to testify about the legislature's purpose. They also contend that Plaintiffs' argument does not take into consideration the effect of the Twenty-first Amendment, in that the court must give deference to the State's stated purpose of the legislation when it addresses core concerns of the Twenty-first Amendment (i.e., defraying costs of regulating the importation of intoxicating liquors).

Judge Bonner's order held that lobbying efforts of the non-party attorneys are not relevant to "the questions of the existence of a valid factor unrelated to protectionism and the absence of less discriminatory alternative [sic] to achieve the State's goal, which are the ultimate questions in this case." The order further directs the non-party attorneys to "produce all documents which do not relate to lobbying efforts and which are not privileged and shall appear at their depositions subject to the foregoing limitations."

Judge Bonner's order is consistent with the holdings in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 584, 351 S.E.2d 190 (1987) and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263

(1984) that "the question for decision in a case in which a liquor law within the ambit of the Twenty-first Amendment is challenged as violating the Commerce Clause is 'whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended.' " Having carefully reviewed *Heublein*, *Bacchus*, and the other authorities cited by the parties in their voluminous "briefs", the Court concludes that where the purpose of a statute on its face supports the tenets underlying the Twenty-first Amendment, the only way to challenge the statute is to prove that its effect does not satisfy its stated purpose. Even though both *Bacchus* and *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) make reference to a challenge made on the basis of a discriminatory *purpose* as distinguished from *effect*, neither is analogous to the case at bar. *Hunt* was decided on the basis that the effect of the statute proved that the purpose was improper and discriminatory, and *Bacchus* involved a statute whose purpose was discriminatory and improper on its face. Thus, in the case at bar, where one court has already found that the purpose of the statute in question "implicates central concerns of the Twenty-first Amendment, i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors," *Heublein, supra* at 584-585, evidence tending to challenge the purpose, including lobbying efforts on the part of the attorneys sought to be deposed, is not relevant.

Having reviewed the record (which includes the transcript of Mr. White's deposition), it does not appear that Plaintiffs seek any information from Mr. White other than his efforts regarding lobbying for the statute in question.

Therefore, Plaintiffs' Motion to Compel is hereby **DENIED**.

II. MOTION OF NON-PARTY ATTORNEYS GEORGE D. BUSBEE AND KING & SPALDING TO QUASH SUBPOENAS AND FOR PROTECTIVE ORDER

Non-party attorneys Busbee and King & Spalding were attorneys for business competitors of the plaintiffs and lobbyists for the current legislation. They have been subpoenaed for deposition and ask for an order quashing the subpoena and protecting them from having to appear at deposition, consistent with Judge Bonner's July order. They rely upon Mr. White's argument *supra*.

Plaintiff's contend that testimony concerning legislative history is relevant in an action to set aside a law and cite to *Fulton County v. Dangerfield*, 260 Ga. 665, 398 S.E.2d 14 (1990). However, *Dangerfield* relates to zoning decisions which is distinguishable from a Commerce Clause challenge to a law which is within the ambit of the Twenty-first Amendment and whose stated purpose implicates the central concerns of the Twenty-first Amendment, as discussed above. Further, it appears that what the Plaintiffs are seeking is lobbying efforts as opposed to legislative history. Plaintiffs' reference to the information sought as "legislative history" as opposed to "lobbying efforts" is mere equivocation. As discussed above, the lobbying efforts of the movants are not relevant in this case.

Therefore, the Motion of Non-Party Attorneys George D. Busbee and King & Spalding to Quash Subpoenas and for Protective Order is hereby **GRANTED**. Plaintiffs are

prohibited from taking the depositions of George D. Busbee and King & Spalding.

III MOTION TO QUASH PLAINTIFFS' SUBPOENA TO FORMER LEGISLATOR LAUREN (BUBBA) MCDONALD AND FOR PROTECTIVE ORDER

Defendants contend that the Plaintiffs' Subpoena for Deposition of Lauren McDonald attempts to obtain the testimony of a former legislator concerning the Legislature's purpose or intent in enacting O.C.G.A. §3-4-60 in violation of the Court's July 28, 1995 order and seek to quash the Subpoena for Deposition of Lauren McDonald and to obtain a protective order. The Defendants further contend that the Court should defer to the stated purpose of the statute.

The Plaintiffs respond that the subpoena was issued after July 28, 1995, so it cannot be in violation of the July 28, 1995 order, and that order dealt with lobbying efforts of non-party attorneys, not the testimony of legislators.

The Plaintiffs cannot use the testimony of a legislator to prove that O.C.G.A. 3-4-60 violates the Commerce Clause based on an underlying improper purpose of "economic protectionism". *Steward v. Atlanta Beef Co.*, 93 Ga. 12, 18 S.E. 981 (1893); *Fulton County v. Dangerfield, supra; Jackson v. Delk*, 257 Ga. 541, 361 S.E.2d 370 (1987); *Southern Railway Co. v. A.O. Smith Corp.*, 134 Ga. App. 219, 213 S.E.2d 903 (1975).

> While the opinion of a member of the legislature which passed an act, or that of the comptroller-general, as to its meaning and purpose, might possibly often be valuable and constructive in

> construing the act and arriving at the legislative intent, it cannot be seriously contended that courts can properly resort to sources of this kind in ascertaining the legislative will as expressed in a statute. These gentlemen [sic.] might differ as to what an act did mean, which would only increase, rather than relieve any difficulty a court might have in construing the law. But aside from this, which is only thrown out as a suggestion in passing, this method of arriving at the meaning of a public statute, cannot, after careful reflection, receive the sanction of any fair mind.

Southern Railway Co., supra at 221 (quoting *Stewart, supra* at 18.) The post-enactment elucidation of a statute by one legislator borders on being irrelevant to show the purpose of the legislature as a whole. *See Edwards v. Aguillard*, 482 U.S. 578, 596 n.19 (1987) & *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor's Concurrence). Further, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *U.S. v. Nixon*, 418 U.S. 683, 705 (1974).

Therefore, the Motion to Quash Plaintiffs' Subpoena to Former Legislator Lauren (Bubba) McDonald and for the Protective Order is hereby **GRANTED**. Plaintiffs are prohibited from taking Mr. McDonald's deposition.

IV. DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND TO ENFORCE THIS COURT'S JULY 28, 1995 ORDER LIMITING DISCOVERY AND FOR OTHER RELIEF.

Defendants seek to enforce the July 28, 1995 order and to "limit Plaintiffs' impermissible discovery efforts." Judge Bonner already issued a protective order on July 28, 1995, and to some extent, this order expands that protective order as well. Defendants have not otherwise shown how the Plaintiffs have failed to comply with the July 28, 1995 order pursuant to O.C.G.A. §9-11-37. It appears that this motion is a mere redundancy of previously filed motions. Therefore, Defendants' Motion for Protective Order and to Enforce this Court's July 28, 1995 Order limiting Discovery and for Other Relief is hereby **DENIED.**

V. PLAINTIFFS' MOTION FOR EXTENSION OF DISCOVERY

In light of the foregoing rulings, it appears that no further discovery need be done at this time. Therefore, Plaintiffs' Motion for Extension of Discovery is hereby **DENIED.** As discussed in prior correspondence with counsel, counsel are ordered to confer with one another regarding the preparation of a scheduling order that would provide time for the parties to file summary judgment motions and a consolidated pre-trial order.

All requests for oral argument are denied.

SO ORDERED, this 17 day of June, 1997.

/s/ Alford J. Dempsey, Jr., Judge
ALFORD J. DEMPSEY, JR., JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AGE INTERNATIONAL, INC., et al., Plaintiffs, vs. STATE OF GEORGIA, et al., Defendants.	)	CIVIL ACTION FILE NO: E-3793
AGE INTERNATIONAL, INC., et al., Plaintiffs, vs. STATE OF GEORGIA, et al., Defendants.	)	CIVIL ACITON FILE NO: E-25073

ORDER ON DEFENDANTS' MOTION TO QUASH SUBPOENA

(Filed Jun. 17, 1997)

Before the Court is Defendants' Motion to Quash Subpoena to Verley J. Spivey and For Protective Order. Plaintiffs seek to depose Mr. Spivey about certain documents that were produced in a prior suit against the Defendants (*James B. Beam Distilling Co. v. State of Georgia*, Fulton County Superior Court, Civil Action File No. D-42527). Mr. Spivey worked as an attorney for the State Attorney General's office at the time those documents were produced. In an order entered on July 28, 1995, Judge Alice Bonner

granted Defendants' Motion for Protective Order regarding these documents, ruling that the Defendants did not waive any privileges associated with the documents at issue. Having reviewed the record and the relevant and applicable law, the court finds that Plaintiffs have not shown the relevance of Mr. Spivey's testimony or that it will lead to the discovery of admissible evidence.

Plaintiffs contend that Mr. Spivey failed to timely file the motion to quash. O.C.G.A. §9-11-45 states that a court may quash a subpoena "upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith." The subpoena scheduled the deposition for September 28, 1995. Both counsel agreed to reschedule the deposition until October 17, 1995. The motion was filed on October 16, 1995. Because the motion was filed before the actual date of the deposition to which both counsel agreed, the court finds that the motion to quash was timely under O.C.G.A. §9-11-45.

For the foregoing reasons, this Court hereby **GRANTS** Defendants' Motion to Quash Subpoena to Verley J. Spivey and for Protective Order. Plaintiffs are hereby prohibited from taking the deposition of Mr. Verley J. Spivey.

Plaintiffs' request for oral argument is denied.

SO ORDERED, this 17 day of June, 1997.

/s/ Alford J. Dempsey, Jr.
ALFORD J. DEMPSEY, JR.,
JUDGE
FULTON COUNTY
SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

APPENDIX H

UNITED STATES CONSTITUTION

Interstate and Foreign Commerce Clause, Article I, Section 8, clause 3

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes

APPENDIX I

UNITED STATES CONSTITUTION

Due Process Clause of the Fourteenth Amendment, Amendment XIV, Section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law

APPENDIX J

UNITED STATES CONSTITUTION

Equal Protection Clause of the Fourteenth Amendment, Amendment XIV, Section 1

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws

APPENDIX K

UNITED STATES CONSTITUTION

Import Export Clause, Article I, Section 10, clause 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revisions and Controul of the Congress

APPENDIX L

UNITED STATES CONSTITUTION

Supremacy Clause, Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding

APPENDIX M
UNITED STATES CONSTITUTION
Amendment XXI

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

APPENDIX N

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

COMPLAINT

Plaintiffs identified specifically in Paragraphs 4 - 29 below (hereinafter sometimes the "Out-of-State Suppliers") bring this civil action against the Defendants named specifically in Paragraphs 30 - 38 below (hereinafter sometimes the "Defendants") and allege as follows:

I. The Parties, Jurisdiction, and Venue

1. The Out-of-State Suppliers ship, deliver, or sell alcohol and distilled spirits, within the meaning of O.C.G.A. § 3-4-60, to wholesalers doing business in the State of Georgia.

2. These alcohol beverages are produced either outside the State of Georgia and within the United States or outside of the United States.

3. The Out-of-State Suppliers are prohibited by Georgia law from shipping, delivering, and selling these alcohol beverages to Georgia wholesalers unless they pay applicable state taxes in advance by purchasing stamps and affixing them or causing them to be affixed to each bottle or container of alcohol beverages shipped into, delivered in, or sold in the State of Georgia.

* * *

II. Procedural History

46. This action seeks refunds, with interest, pursuant to O.C.G.A. § 48-2-35 (hereinafter sometimes the "refund statute") (as it existed prior to amendment by the Act to Amend Title 3 of the Official Code of Georgia Annotated, *etc.* (hereinafter sometimes the "1992 Act")), for taxes imposed pursuant to O.C.G.A. § 3-4-60 on distilled spirits and alcohol.

47. A true and correct copy of the refund statute is attached hereto as Exhibit A and by this reference incorporate herein.

48. A true and correct copy of the 1992 Act is attached hereto and by this reference incorporated herein as Exhibit B.

49. In Section 5(d), the 1992 Act provides that, with regard to taxes paid and stamps purchased prior to the effectiveness of the 1992 Act and with regard to which an application for credit or claim for refund has been filed prior to the effectiveness of the 1992 Act, the law in effect at the time the application for credit or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payment.

50. The 1992 Act by its terms became effective on April 13, 1992 at the time Defendant Zell Miller approved the Act.

51. Each of the Out-of-State Suppliers has timely filed an Application for Tax Refund.

52. Each such Application for Tax Refund concerns taxes paid and stamps purchased prior to the effectiveness of the 1992 Act.

53. Each such Application for Tax Refund was filed prior to the effectiveness of the 1992 Act.

54. A true and correct copy of the Application for Tax Refund filed by Plaintiff Age International, Inc. is attached hereto and by this reference incorporated herein as Exhibit C.

* * *

80. Each of the Out-of-State Suppliers made a request for a conference or hearing before the Revenue Commissioner in connection with its Application(s) for Tax Refund.

81. The Revenue Commissioner has failed to grant any of these requests for a conference or hearing.

82. This action is timely commenced pursuant O.C.G.A. § 48-2-35 and to Section 5(d) of the 1992 Act.

III. General Allegations

83. The taxes at issue were erroneously and illegally assessed and collected for the reason that the statute imposing these taxes, O.C.G.A § 3-4-60, is invalid, both on its face and as applied, under United States law and Georgia law.

84. The violations of United States law and Georgia law by the State of Georgia are both historical and continuing as are the efforts of the State of Georgia to

deprive the Out-of-State Suppliers of a remedy for the violations.

85. A true and correct copy of O.C.G.A. § 3-4-60 as it was approved on April 1, 1985 (hereinafter sometimes the "1985 statute"), which is the subject of this lawsuit, is attached hereto and by this reference incorporated herein as Exhibit W.

86. Distilled spirits and alcohol are manufactured in the State of Georgia and shipped and delivered to wholesalers doing business in the State of Georgia.

87. The State of Georgia first undertook to discriminate against suppliers of alcohol beverages manufactured outside the State of Georgia and to foster and protect suppliers of alcohol beverages manufactured inside the State of Georgia shortly after Prohibition was repealed by the Twenty-First Amendment to the United States Constitution.

88. The Commerce Clause of the United States Constitution mandated the creation of an economic union to replace the economic Balkanization permitted by the Articles of Confederation of the Republic that preceded the United States Constitution.

89. The State of Georgia sought to justify its discrimination against suppliers of out-of-state alcohol beverages and its protection of suppliers of in-state alcohol beverages by asserting that the Twenty-First Amendment was a pro tanto repeal of the Commerce Clause.

90. By asserting that the Twenty-First Amendment in effect repealed the Commerce Clause with respect to

any law or regulation having to do with alcohol beverages, the State of Georgia maintained that discriminatory measures that would otherwise be prohibited by the Commerce Clause were constitutionally permissible as long as the subject matter of the regulation was alcohol beverages.

91. A true and correct copy of O.C.G.A. § 3-4-60 as it existed prior to March 31, 1985 (hereinafter sometimes the "pre-1985 statute") is attached hereto and by this reference incorporated herein as Exhibit X.

92. Prior to 1985, the State of Georgia taxed distilled spirits and alcohol originating outside the State of Georgia at twice the rate as those that were "manufactured in this State" and made "from Georgia-grown products."

93. In other words, on its very face, the pre-1985 statute evinced a purpose to foster and protect, not only the in-state manufacture of distilled spirits and alcohol, but also the in-state agricultural production of the products used to manufacture these beverages.

94. The pre-1985 statute imposed a tax in the amount of $.50 upon every liter of distilled spirits manufactured in the State of Georgia from Georgia grown products.

95. By contrast, for distilled spirits manufactured outside the State of Georgia, the pre-1985 statute doubled the amount of the tax to $1.00 per liter of distilled spirits.

96. Similarly, the pre-1985 statute imposed a tax in the amount of $.70 upon every liter of alcohol manufactured in the State of Georgia from Georgia grown products.

97. By contrast, for alcohol manufactured outside the State of Georgia, the pre-1985 statute doubled the amount of the tax to $1.40 per liter of alcohol.

98. In 1984, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984) (hereinafter sometimes "*Bacchus*"), the United States Supreme Court rejected the proposition that the Twenty-First Amendment was a pro tanto repeal of the Commerce Clause of the United States Constitution.

99. In *Bacchus*, the United States Supreme Court struck down as violative of the Commerce Clause a Hawaii statute that fostered and protected producers of alcohol beverages in Hawaii by imposing higher and discriminatory taxes on alcohol beverages manufactured outside the State of Hawaii.

100. Shortly after the United States Supreme Court's 1984 *Bacchus* decision, the State of Georgia and representatives of Georgia producers of alcohol beverages agreed to continue in effect the longstanding policy of fostering and protecting suppliers of in-state alcohol beverages by discriminating against out-of-state suppliers of alcohol beverages despite the Supreme Court's determination that such discrimination and protectionism violate the Commerce Clause.

101. In furtherance of this plan to continue this invidious discrimination and protectionism, representatives of Georgia producers of alcohol beverages developed the so-called "import approach." Under this plan, the same discriminatory and protectionist alcohol tax system in place since the 1930s (and, with it, the policy of

fostering and protecting suppliers of in-state alcohol beverages by discriminating against suppliers of out-of-state alcohol beverages) would remain in place, but under a newly enacted statute reciting as a subterfuge legislative purposes linked with the language contained in the Twenty-First Amendment.

102. Under the import approach, the statute, although it would leave in place the very same discriminatory double taxation and protectionist single taxation, was to be worded so as to impose taxes upon the facially more neutral activities of a) first sale, use, or delivery of beverages and b) importation of beverages into Georgia.

103. Thus, under the new import approach, subpart (1) of O.C.G.A. § 3-4-60 would impose one tax upon the "first sale, use, or final delivery within this state," and subpart (2) of O.C.G.A. § 3-4-60 would impose a second and double tax upon "the importation . . . into this state."

104. This sleight of hand continued the invidious discrimination and protectionism because beverages produced in state are never imported into Georgia. Thus, alcohol beverages produced in Georgia would never be subject to the import tax and, therefore, would continue to be favored and protected by the new import approach.

105. There was one problem with the import approach. With its facially more neutral concepts of a) first sale, use, and delivery and b) importation, the import approach clearly continued the longstanding policy of fostering and protecting the in-state production of alcohol beverages, just as had the pre-1985 statute – albeit in a less obvious way. But the pure import approach

would not work to foster and protect the in-state agricultural producers of the products used to make these beverages.

106. Thus, although the pure and facially more neutral import approach would continue the pre-1985 statute's policy of fostering and protecting suppliers of in-state beverage production, it would surrender the protection also afforded to suppliers of in-state agricultural production by the pre-1985 statute. Under the pure import approach, in-state beverage producers would become free for the first time to buy the component products they needed from anywhere, not just from within Georgia, without sacrificing the tax benefit afforded them by the new protectionist statute. In other words, the pure import approach would sacrifice the protection and promotion of Georgia growers of agricultural products.

107. The cost was too high, and the pure and facially more neutral import approach was compromised and undercut and ultimately defeated by a modification to include express language of overt unconstitutional economic protectionism on the very face of the statute.

108. Thus, a third subpart was tacked onto subparts (1) and (2), which compose the pure and facially more neutral import approach. The tacked-on subpart (3) of the 1985 statute provides that "All alcohol spirits manufactured within this state for sale within this state *shall be made from Georgia grown products.*" (Emphasis supplied)

109. Under this modified import approach, the in-state beverage producers would have to continue to buy their component products in state, just as under the

pre-1985 statute, in order to continue to benefit from the discriminatory tax rates. By this means, the protection also afforded the in-state agricultural producers under the pre-1985 statute was continued under the 1985 statute as well.

110. With its enactment of the 1985 statute, the State of Georgia adopted the in-state alcohol beverage producers' import approach, as modified to accommodate the in-state agricultural producers.

111. Thus was the protection of the in-state agricultural producers restored, but at a new cost: This time, at the cost of the pure and facially more neutral import approach.

112. The inclusion of the tacked-on subpart (3) of O.C.G.A. § 3-4-60, with its express protection of "Georgia grown products," made it painfully obvious once again on the very face of the statute (and in language taken directly, but for the omission of a hyphen, from the unconstitutional pre-1985 statute) that the whole plan to enact a new statute almost identical in form and substance to the double-taxing pre-1985 statute was simply designed to avoid the mandate of the United States Supreme Court's 1984 *Bacchus* decision and to continue in place the economic protectionism that the State of Georgia had always maintained was its prerogative under the Twenty-First Amendment.

113. Incorporating the modified import approach, the 1985 statute imposes a tax in the amount of $.50 upon every liter of distilled spirits manufactured in the State of Georgia from Georgia grown products. This is the same tax in effect under the pre-1985 statute.

114. By contrast, for distilled spirits manufactured outside the State of Georgia, the 1985 statute doubles the amount of the tax to $1.00 per liter of distilled spirits. This is the same tax in effect under the pre-1985 statute.

115. Similarly, the 1985 statute imposes a tax in the amount of $.70 upon every liter of alcohol manufactured in the State of Georgia from Georgia grown products. This is the same tax in effect under the pre-1985 statute.

116. By contrast, for alcohol manufactured outside the State of Georgia, the 1985 statute doubles the amount of the tax to $1.40 per liter of alcohol. This is the same tax in effect under the pre-1985 statute.

117. Anticipating that its blatant subterfuge might not withstand judicial scrutiny, the State of Georgia implemented the modified import approach with a complicated series of enactments and repeals so as to obscure its discriminatory purpose and to attempt to assure that a valid statute observing the mandate of the Commerce Clause would automatically come into effect in the event that the discriminatory and protectionist modified import approach version of the statute should be struck down.

118. In Spring of 1985, the General Assembly of the State of Georgia enacted an act (approved March 31, 1985) striking the pre-1985 statute and inserting in lieu thereof a new O.C.G.A. § 3-4-60 (hereinafter sometimes the "fall-back constitutional statute") granting an equal tax on "all distilled spirits, whether imported into this state or manufactured in this state" and granting an equal tax on "all alcohol whether imported into this state or manufactured in this state."

119. A true and correct copy of the act adopting the fallback constitutional statute is attached hereto and by this reference incorporated herein as Exhibit Y.

120. Immediately thereafter, the Georgia General Assembly enacted yet another act (approved April 1, 1985) striking the fallback constitutional statute and inserting in lieu thereof the 1985 statute incorporating the modified import approach.

121. A true and correct copy of the act adopting the modified import approach 1985 statute is attached hereto and by this reference incorporated herein as Exhibit Z.

122. At the same time, the State of Georgia provided that the fallback constitutional statute, which had been in effect for only a single day, would "revive" if ever the modified import approach 1985 statute should later be deemed invalid.

123. The newly enacted modified import approach 1985 statute (which has remained the operative statute throughout the periods at issue in the Out-of-State Suppliers' Applications for Tax Refund), imposes a tax of $.50 per liter for distilled spirits and $.70 per liter for alcohol produced in state from Georgia grown products, precisely as did the pre-1985 statute. On the other hand, the 1985 statute imposes a tax of twice that amount at $1.00 and $1.40 per liter on imported distilled spirits and alcohol, respectively, as did the pre-1985 statute.

124. In enacting the modified import approach 1985 statute, the Georgia General Assembly recited that the enactment would provide for the increased cost of administration and collection of revenues.

125. The Georgia General Assembly also purported to find and determine "that the cost of regulating and administering the manufacture, distribution, and sale of [alcohol beverages] consumed in this state is greater for imported [alcohol beverages] than it is for [alcohol beverages] produced within this state."

126. The finding and determination was a sham intended solely to obscure the purpose behind the modified import approach 1985 statute, which was designed to continue to discriminate against alcohol beverages produced outside the State of Georgia and to provide a competitive advantage to Georgia producers.

127. By way of example, imported alcohol beverages are by definition *never manufactured* in the State of Georgia. On the other hand, alcohol beverages produced within the State of Georgia are by definition *always manufactured* in the State of Georgia. The cost of regulating and administering the *manufacture* of alcohol beverages therefore can *never* be greater for imported alcohol beverages than it is for alcohol beverages produced within the State of Georgia.

128. In 1987, in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 ("*Heublein*"), *appeal dismissed*, 483 U.S. 1013 (1987), the Supreme Court of Georgia upheld the 1985 statute in the face of a limited challenge to the statute under the Commerce Clause of the United States Constitution.

129. In its opinion, the Georgia Supreme Court recited the finding and determination of the Georgia General Assembly set forth in Paragraph 125 above and a similar finding by the trial court.

130. In its opinion, the Georgia Supreme Court stated that the plaintiff before the court did not challenge the purpose of the 1985 statute and concluded that, for the reason that the unchallenged purpose of the 1985 statute was to defray the increased costs of regulating the importation into the State of Georgia of intoxicating liquors, the trial court had not erred in sustaining the validity of the 1985 statute.

131. The amount of revenue raised each year by the State of Georgia through the extra tax borne solely by imported alcohol products exceeds by several multiples the entire annual budget for all kinds of regulation (not just regulation pertaining to importation into the State of Georgia) of all kinds of imported *and* local alcohol beverages (not just distilled spirits and alcohol).

132. In *James B. Beam Distilling Company v. State,* Civil Action No. D-42527 (Fulton Super.) (hereinafter sometimes *"Beam"*); *Joseph E. Seagram & Sons, Inc. v. State,* Civil Action File No. 87-7070-8 (Dekalb Super.) (hereinafter sometimes *"Seagram"*); and *Heublein, Inc. v. State,* Civil Action File No. 87-3542-6 (DeKalb Super.) (hereinafter sometimes *"Heublein II"*), the pre-1985 statute has been challenged in separate actions in the Superior Courts of Georgia.

133. In the discovery phase of the *Beam* action concerning the pre-1985 statute, the State of Georgia produced documents concerning the legislative history of the 1985 statute that had not been produced or considered by the court in the earlier and unsuccessful *Heublein* court challenge to the 1985 statute.

134. Relying upon the newly disclosed evidence concerning the enactment of the modified import approach 1985 statute, the Fulton County Superior Court in *Beam* found and held that the purpose of the pre-1985 statute was economic protectionism (that is, to benefit local business and local industry) and that the pre-1985 statute was therefore in violation of the Commerce Clause of the United States Constitution.

135. On appeal, the Georgia Supreme Court in *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989), affirmed that both the purpose and the effect of the pre-1985 statute were simple economic protectionism and that the pre-1985 statute was invalid under the Commerce Clause of the United States Constitution.

136. Both the Fulton County Superior Court and the Georgia Supreme Court in *Beam* limited their holdings to prospective application only. This limitation had the effect of denying any refund relief to the taxpayer in *Beam* because, by that time, the pre-1985 statute had been replaced by the 1985 statute incorporating the modified import approach.

137. With this sequence of events, the State of Georgia had finally purported to acknowledge the Commerce Clause's prohibition of discriminatory and protectionist taxes on alcohol beverages (at least as to the pre-1985 statute). Nevertheless, the State of Georgia has to this day refused to grant any remedy to beverage taxpayers who were forced to pay taxes under the unconstitutional pre-1985 statute.

138. Additionally, through this sequence of events, the State of Georgia has fulfilled its purpose of discrimination and protectionism through the imposition of the exact same invalid double taxation in the exact same amounts, now reimposed by the modified import approach 1985 statute and continuing to this very day.

139. With this result, the State of Georgia deliberately violated the Commerce Clause of the United States Constitution.

140. In *James B. Beam Distilling Co. v. State of Georgia*, ___ U.S. ___, 111 S. Ct. 2439 (1991), the United States Supreme Court held that its ruling in *Bacchus* and the Georgia Courts' ruling in *Beam* (that the pre-1985 statute violated the Commerce Clause) must not be limited to prospective application, but must also be applied to the taxpayer in *Beam* and other similarly situated litigants. Notwithstanding that decision, the State of Georgia continues in its efforts to thwart the purpose of the Commerce Clause and to ignore the mandates of the Fourteenth Amendment to the United States Constitution by refusing to refund any money to the taxpayers in *Beam*, *Seagram*, and *Heublein II* or otherwise to grant them any retrospective relief. The State of Georgia has done so through the assertion of new defenses in *Beam*, *Seagram*, and *Heublein II* after the *Beam* case was remanded by the United States Supreme Court.

141. Additionally, since the decision of the United States Supreme Court in *Beam*, the State of Georgia has enacted new legislation (the 1992 Act) as described below in an effort to deny beverage taxpayers a remedy;

included within the 1992 Act is a purported repeal of the provision for interest on tax refunds.

142. The United States Supreme Court's reversal of the Georgia Supreme Court's prospectivity limitation on its holding in *Beam* (that the pre-1985 statute was unconstitutional) launched a movement to amend the 1985 statute so as to equalize the tax.

143. The Georgia General Assembly refused to amend the 1985 statute, deciding instead to continue the policy of discriminating against out-of-state beverage suppliers and fostering and protecting in-state beverage suppliers by leaving the modified import approach 1985 statute intact.

144. Instead of equalizing the tax so as to eliminate the 1985 statute's invalidity under United States law, the Georgia General Assembly with its enactment of the 1992 Act singled out the alcohol beverage taxpayers who hold the claims of invalidity from all other Georgia taxpayers for a special cut-off and elimination of remedies to enforce those claims.

145. Prior to April 13, 1992, the only retrospective remedy under Georgia law for taxes erroneously or illegally assessed or collected that was available with respect to taxes paid or stamps purchased for alcohol beverages was the refund statute, O.C.G.A. § 48-2-35 (Exhibit A).

146. Although the State of Georgia contends that the refund statute is unavailable to alcohol beverage taxpayers, the refund statute provided for the mandatory payment of a full refund of all taxes or fees "determined

to have been erroneously or illegally assessed and collected . . . under the laws of this state, whether paid voluntarily or involuntarily."

147. Although the State of Georgia contends that the refund statute is unavailable to alcohol beverage taxpayers, the refund statute provided for the payment of "interest on the amount of taxes or fees [erroneously or illegally assessed or collected] at the rate of 9 percent per annum from the date of payment of the tax or fee."

148. In Sections 5(d) and 6, the 1992 Act purported to repeal the provision for interest.

149. The 1992 Act purported to repeal the interest provision even as to tax refund applications involving taxes paid before the effectiveness of the 1992 Act.

150. The 1992 Act purported to repeal the interest provision even as to tax refund applications filed with the Revenue Commissioner before the effectiveness of the 1992 Act.

151. Both the purpose and the effect of the 1992 Act are to retaliate against and discriminate against alcohol beverage taxpayers with claims of invalidity concerning the alcohol tax system of the State of Georgia and its protectionist treatment of in-state alcohol beverages and the suppliers of such beverages through its discriminatory treatment of out-of-state alcohol beverages and the suppliers of such beverages.

152. The 1992 Act's purported repeal of the interest provision is invalid in that the 1992 Act was enacted in violation of United States law.

* * *

154. The 1992 Act's purported repeal of the interest provision is, as a retroactive law, invalid generally and invalid with respect to the Out-of-State Suppliers in that it violates the Constitution of the United States, including, but not limited to, the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and the prohibition in the United States Constitution against passage by any state of "any Bill of Attainder, ex post facto Law," U.S. Const. art. I, § 10, cl.1.

* * *

A. **First Claim: Violation of Supremacy Clause and Commerce Clause**

* * *

B. **Second Claim: Violation of Supremacy Clause and Import Export Clause**

* * *

C. **Third Claim: Violation of Supremacy Clause and Due Process**

* * *

D. **Fourth Claim: Violation of Supremacy Clause and Equal Protection**

* * *

E. **Fifth Claim: Due Process**

* * *

EXHIBIT A

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b) (1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or his counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident and maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding

be commenced after the expiration of two years from the date the claim is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

O.C.G.A. § 48-2-35

EXHIBIT B

SENATE BILL 774

By: Senators Langford of the 35th, Dawkins of the 45th, Taylor of the 12th and others

[AS PASSED]

AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change the provisions for and limitations upon refunds or

credits for taxes on alcoholic beverages; to change provisions relating to the manner of collecting state excise taxes on distilled spirits; to amend Code Section 48-2-35 of the Official Code of Georgia Annotated, relating to refund of taxes, so as to clarify that said Code section does not apply to taxes paid or stamps purchased for alcoholic beverages; to provide an effective date; to provide for applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking Code Section 3-2-13, relating to the issuance of refunds or credits for taxes paid on alcoholic beverages or stamps purchased, and inserting in lieu thereof a new Code Section 3-2-13 to read as follows:

"3-2-13. (a) Notwithstanding any other provision of this title or any other title to the contrary, the provisions of this article shall provide the exclusive remedy and procedure for seeking and obtaining any and all refunds or credits for taxes paid on alcoholic beverages and for stamps purchased in payment of taxes on alcoholic beverages. No refund in the form of a disbursement from the state treasury shall be allowed for any such taxes or payments. No credit shall be allowed for any such taxes or payments unless expressly authorized by this article.

(b) The commissioner may issue credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue credits for stamps purchased by a manufacturer, distiller, or

wholesaler when it is shown to the commissioner's satisfaction that any of the following events have occurred:

(1) Alcoholic beverages have been received by the wholesaler through an error in shipment and the alcoholic beverages are returned to the shipper prior to any sale by the wholesaler in this state;

(2) Alcoholic beverages ordered by the wholesaler have been destroyed in transit prior to entry into the wholesaler's warehouse or storage area;

(3) Alcoholic beverages which are unfit for consumption upon receipt have been received by the wholesaler and the alcoholic beverages are returned to the shipper or destroyed prior to any sale by the wholesaler in this state;

(4) Alcoholic beverages have been destroyed while in the possession of a wholesaler within the state by an act of God, such as fire, flood, lightning, wind, or other natural calamity;

(5) Wines have been sold by the wholesaler for delivery and consumption outside the state, provided the sale and delivery shall in all respects comply with the requirements of Code Section 3-6-26.1; or

(6) Taxes were paid or stamps were purchased under a statute expressly held to be unconstitutional by a court of last resort and the payments were made under protest and the ground of the protest was the same as the basis for the ruling of unconstitutionality by the court of last resort.

(c) No person shall receive a credit for taxes paid or stamps purchased in any case where an amount equal to the amount of taxes paid or to the cost of the stamps purchased has been charged to or paid by any purchaser of the person seeking a refund or credit. When an applicant is issued a credit for taxes paid or stamps purchased, in every case where an amount equal to the amount of taxes paid or cost of the stamps purchased has been charged to or paid by any purchaser of the applicant, the applicant shall refund or credit to the purchaser or customer an amount equal to the credit allowed by the commissioner."

Section 2. Said title is further amended by striking Code Section 3-2-14, relating to limitations on refunds, and inserting in lieu thereof a new Code Section 3-2-14 to read as follows:

"3-2-14. (a) No credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages shall be allowed unless an application for credit is filed with the commissioner within 90 days from the date payment is received by the commissioner. If, in the opinion of the commissioner, an application for credit of taxes paid pursuant to this title contains a false statement, the application shall be denied. When an applicant is indebted to the state or an applicant is in violation of this title, the commissioner shall decline to approve the credit until the applicant has complied with the laws of this state. In no event shall interest be allowed on any refund or credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages. Nothing contained in this Code section shall be construed so as to allow for a credit or refund of any license fee lawfully due or paid under this title.

(b) Each application for credit shall be filed in writing in the form and containing such information as the commissioner may reasonably require. The commissioner or his delegate shall consider information contained in the application, together with such other information as may be available, and shall approve or disapprove the application and notify the applicant of his action. Any applicant whose claim is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a credit in the Superior Court of Fulton County. No action or proceeding for the recovery of a credit shall be commenced before the expiration of one year from the date of filing the application unless the commissioner or his delegate renders a decision on the application within that time, nor shall any action or proceeding be commenced after the occurrence of the earlier of (1) the expiration of one year from the date the claim is denied, or (2) the expiration of two years from the date the application was filed. The time for filing an action for the recovery of a credit may be extended for such period as may be agreed upon in writing between the applicant and the commissioner during the period authorized for bringing an action or any extension thereof. In the event any application is approved and the taxpayer has not paid other state taxes which have become due, the commissioner may set off the unpaid taxes against the credit. When the setoff authorized in this Code section is exercised, the credit shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess credit properly allowable under this Article which remains

after the setoff has been applied may be credited to the taxpayer."

Section 3. Said title is further amended by striking Code Section 3-4-61, relating to the collection of state excise taxes on distilled spirits, which reads as follows:

"3-4-61. (a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be collected in the following manner:

(1) The commissioner shall prescribe suitable stamps in proper denominations denoting the payment of taxes imposed by this part, and the tax provided shall be administered and collected by means of adhesive stamps lithographed with an intricate geometric design on safety paper or in a manner as may be prescribed by the commissioner;

(2) Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax; and

(3) All manufacturers, distillers, or wholesalers who sell, ship, or deliver to each other shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax.

(b) The commissioner may at his discretion replace mutilated stamps when fully satisfied that the stamps have not been used.",

and inserting in lieu thereof a new Code Section 3-4-61 to read as follows:

"3-4-61. (a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be paid by the licensed wholesale dealer in distilled spirits.

(b) The taxes shall be paid on or before the tenth day of the month following the calendar month in which the beverages are sold or disposed of within the particular municipality or county by the wholesale dealer.

(c) Each license responsible for the payment of the excise tax shall file a report itemizing for the preceding calendar month, by size and type of container, the exact quantities of distilled spirits sold during the month within the state. The licensee shall file the report with the commissioner.

(d) The wholesaler shall remit to the commissioner the tax imposed by the state on the tenth day of the month following the calendar month in which the sales were made.

(e) In order to phase in the reporting system of excise tax payment for distilled spirits and alcohol:

(1) The commissioner shall direct that no later than January 31, 1993, all persons who made excise tax payments in respect of distilled spirits and alcohol sales in the State of Georgia during the calendar year 1992 shall make a one-time deposit equal to the amount of 25 percent of said tax payments. This one-time advance shall be repaid in full by the state in equal semiannual installments over the period of 24 months following August 1, 1993, except that, in the event wholesalers made payments as provided for

in this paragraph, the commissioner shall repay such wholesalers in the form of semi-annual credits against future tax liability;

(2) On February 1, 1993, or as soon thereafter as practicable, the commissioner shall direct that an inventory be taken of stamped merchandise and tax stamps held by manufacturers, shippers, and wholesalers. The commissioner shall issue refunds to all manufacturers and shippers for the value of tax stamps in their possession on February 1, 1993, to be paid in 12 equal installments beginning on August 1, 1993. The commissioner shall issue tax credits to wholesalers for stamps in inventory on February 1, 1993, which shall be applied as credits against the wholesaler's future tax liability for the 12 month period beginning with the report due on August 10, 1993,

(3) Nothing in this subsection shall be construed to impose an additional excise tax on distilled spirits and alcohol held in inventory by wholesalers and retailers above the excise tax paid prior to February 1, 1993; and

(4) The commissioner shall adopt rules and regulations for the implementation of a reporting method of paying distilled spirits and alcohol excise taxes as well as the elimination of the use of any type of distilled spirits and alcohol stamp. The commissioner shall have full authority to allow credits or make refunds as provided for this subsection."

Section 4. Code Section 48-2-35 of the Official Code of Georgia Annotated, relating to refunds of taxes, is amended by adding a new subsection (d) at the end thereof to read as follows:

"(d) This Code section shall not apply to taxes paid or stamps purchased for alcoholic beverages pursuant to Title 3."

Section 5. (a) Section 3 of this Act shall become effective February 1, 1993. All other provisions of this Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

(b) With regard to taxes paid and stamps purchased on or after the effective date of this Act, all provisions of this Act shall fully apply.

(c) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which no application for credit or claim for refund was filed prior to the effective date of this Act, all of the provisions of this Act shall apply, provided that, with regard to payments made less than three years prior to the effective date of this Act, the taxpayer shall have 90 days from the effective date of this Act within which to file with the commissioner the protest and the application for credit provided for by this Act, and provided, further, that no interest shall be allowed on any such taxes paid or stamps purchased.

(d) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which an application for credit or claim for refund has been filed prior to the effective date of this Act, the law which was in effect at the time the application for credit

or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payments, and provided, further, that if a suit for refund or credit has not been filed prior to the effective date of this Act with regard to any such application or claim, any suit for recovery of a credit pertaining to such a claim or application must be filed within 90 days after the effective date of this Act.

Section 6. All laws and parts of laws in conflict with this Act are repealed.

EXHIBIT C

VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

The Lenox Building, 3399 Peachtree Road
Suite 1700, Atlanta, Georgia 30326
Telephone: (404) 841-3200
Telecopy: (404) 841-3221
Telex: 650 298-1749

March 27, 1992

[Filed March 27, 1992]

[Refused Transferred Alcohol Unit]

VIA HAND DELIVERY

Ms. Judy Martin
Department of Revenue
State of Georgia
270 Washington Street, Room 312
Atlanta, Georgia 30334

RE: *Application for Tax Refund and Request for Conference or Hearing by Age International, Inc.*

Dear Ms. Martin:

Please find enclosed an Application for Tax Refund and Request for Conference or Hearing, in triplicate, for filing with the Department of Revenue. The Application and Request is made on Form ATT-89 only because this Form, from among all the forms issued by the Department, seemed best suited for the type of tax refund application being made here. Also enclosed for filing with the Department is the Power(s) of Attorney pertinent to the Application and Request.

These materials are being filed simultaneously with the Alcohol and Tobacco Tax Unit, Room 315, of the Department of Revenue. If that is the appropriate unit for handling the enclosed Application and Request then, after receiving these materials for filing, kindly forward them within the Department to that unit.

Also enclosed are copies of the Application and Request and the Power(s) of Attorney for our files. Kindly stamp the file copies as "filed" and return them to the courier, who will bring them to our offices.

Thanking you for your attention to this matter, I am,

Very truly yours,

/s/ John L. Taylor, Jr./JTC
John L. Taylor, Jr.

JLTjr:ww

Enclosures

(SEAL)

GEORGIA DEPARTMENT OF REVENUE
ALCOHOL AND TOBACCO TAX DIVISION
315 TRINITY-WASHINGTON BUILDING
ATLANTA, GEORGIA 30331

APPLICATION FOR CREDIT FOR BEVERAGE ALCOHOL TAXES

PART 1 – To be filled in by claimant

1. NAME AND ADDRESS OF CLAIMANT
Age International, Inc.

ADDRESS Leestown Road,

CITY Frankfort,

STATE Kentucky

ZIP CODE 40601

2. KIND OF TAX CREDIT CLAIMED
[x] DISTILLED SPIRITS [ ] MALT BEVERAGE
[ ] WINE

3. AMOUNT OF TAX CREDIT CLAIMED
$ 1,381,537.50

4. BASIS OF CLAIM (Give the detailed information for which the claim is filled and other facts which will tell the State Revenue Commissioner the exact basis for the claim. Please identify any documents or statements submitted in support of this claim.)

This claim is a claim for a refund for the excise tax imposed pursuant to O.C.G.A. § 3-4-60 on distilled spirits and alcohol and for attorneys fees. The claim is brought pursuant to O.C.G.A. § 48-2-35; 42 U.S.C. § 1983; 42 U.S.C. § 1988; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S.

Const., amend. XIV, § 1; and Article I, Section I, Paragraph I of the Constitution of the State of Georgia, entitled "Life, liberty, and property."

It has become clear through disclosures made by the State of Georgia and through other events that the true purpose and actual effect of the excise tax is economic protectionism. For these reasons, among others, the basis of the claim is the unconstitutionality of the excise tax in that it violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3; the Import Export Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 2; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV, § 1; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; Article I, Section I, Paragraph I of the Constitution of the State of Georgia, entitled "Life, liberty, and property"; Article I, Section I, Paragraph II of the Constitution of the State of Georgia, entitled "Protection to person and property; equal protection"; Article VII, Section III, Paragraph I of the Constitution of the State of Georgia, entitled "Taxation; purposes for which powers may be exercised"; Article III, Section VI, Paragraph I of the Constitution of the State of Georgia, entitled "General powers"; and Article I, Section II, Paragraph V of the Constitution of the State of Georgia, entitled "What acts void."

At the State Revenue Commissioner's request, the claimant will supply further information and facts showing the basis of the claim and further documents and statements in support of the claim. The claimant hereby

requests a conference or hearing before the State Revenue Commissioner of this Application for Tax Refund.

(ATTACH LETTER SIZE SHEET IF MORE SPACE IS REQUIRED)

Under penalties of perjury, I declare that I have examined this claim, including supporting documents and statements, and to the best of my knowledge and belief, it is true, correct and complete. Also I hereby declare no claim has been or will be made against any common carrier or insurance company for the amount of State excise tax claimed above.

5. BY (Signature and Title) NOTE: Signature must be that of an owner, partner, authorized officer or licensee.

/s/ Gary T. Thompson, Vice President-Controller through John L. Taylor, Jr., Attorney-in-Fact

Gary T. Thompson, Vice President-Controller through John L. Taylor, Jr., Attorney-in-Fact

6. Date 3-25-92

POWER OF ATTORNEY

To: The Georgia Department of Revenue and To Whom It May Concern

AGE INTERNATIONAL, INC., [address] Leestown Road, Frankfort, Kentucky 40601, hereby appoints John L. Taylor, Jr., Esquire of Vincent, Chorey, Taylor & Feil, P.C., Suite 1700, The Lenox Building, 3399 Peachtree Road, N.E., Atlanta, Georgia 30326 as attorney-in-fact to represent it before the Georgia Department of Revenue concerning claims for refund of Georgia taxes imposed on alcoholic beverages. John L. Taylor, Jr. and Vincent,

Chorey, Taylor & Feil, P.C., are authorized to receive confidential information and to perform any and all acts that AGE INTERNATIONAL, INC. can perform with respect to such refund claim, including, but not limited to, the execution of the claim for refund.

/s/ Gary T. Thompson V.P.
[name] Gary T. Thompson
[title] V.P.-Controller
AGE INTERNATIONAL, INC.

STATE OF KENTUCKY

COUNTY OF FRANKLIN

The foregoing Power of Attorney was subscribed and sworn to me this 18th day of March, 1992 by the above-signed of AGE INTERNATIONAL, INC. acting for and on behalf of said corporation.

My Commission expires
My Commission Expires April 26, 1995.

/s/ Maxine K. Wiley
Notary

EXHIBIT W

The following state taxes are levied and imposed.

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of 50¢ per liter and, upon the first sale, use, or final delivery within this state of all

alcohol, an excise tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of 50¢ per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products.

O.C.G.A. § 3-4-60

EXHIBIT X

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter,

and a proportionate tax at the same rate on all fractional parts of a liter.

O.C.G.A. § 3-4-60

EXHIBIT Y

ACTS AND RESOLUTIONS

OF THE

GENERAL ASSEMBLY

OF THE

STATE OF GEORGIA

1985

ALCOHOLIC BEVERAGES – EXCISE TAXES ON ALCOHOL, DISTILLED SPIRITS, TABLE WINES, AND DESSERT WINES.

Code Sections 3-4-60 and 3-6-50 Amended.

No. 539 (House Bill No. 463).

AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change certain excise taxes on distilled spirits, alcohol, table wines, and dessert wines; to provide that such taxes shall be levied on the first sale, use, possession, or final

delivery; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of excise taxes on distilled spirits and alcohol, which reads as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter.",

and inserting in lieu thereof a new Code Section 3-4-60 to read as follows:

"3-4-60. There is levied and imposed on the first sale, use, possession, or final delivery the following state excise taxes:

(1) On all distilled spirits, whether imported into this state or manufactured in this state, a tax of $1.00 per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On all alcohol, whether imported into this state or manufactured in this state, a tax of $1.40 per liter and a proportionate tax at the same rate on all fractional parts of a liter."

Section 2. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of excise taxes on wines, which reads as follows:

"3-6-50. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Forty cents per liter and a proportionate tax on like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter, and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.",

and inserting in lieu thereof a new Code Section 3-6-50 to read as follows:

"3-6-50. There is levied and imposed on the first sale, use, possession, or final delivery of wines within this state the following taxes:

(1) On table wine, a tax of 40¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On dessert wines, a tax of 67¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

Section 3. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 4. All laws and parts of laws in conflict with this Act are repealed.

Approved March 31, 1985.

EXHIBIT Z

ACTS AND RESOLUTIONS

OF THE

GENERAL ASSEMBLY

OF THE

STATE OF GEORGIA

1985

ALCOHOLIC BEVERAGES – EXCISE TAXES ON ALCOHOL, DISTILLED SPIRITS, TABLE WINES, AND DESSERT WINES.

Code Sections 3-4-60 and 3-6-50 Amended.

No. 540 (House Bill No. 564).

AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to provide for legislative intent; to establish excise taxes upon the first sale, use, or final delivery within this state of

alcohol, distilled spirits, tablewines, and dessert wines; to establish a tax upon the importation for use, consumption, or final delivery into this state of alcohol, distilled spirits, table wines, and dessert wines; to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; to promote temperance; to provide an effective date; to provide that this Act shall not be severable; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. The General Assembly finds and determines that the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

Section 2. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of state excise taxes imposed on alcohol and distilled spirits, and inserting in its place a new Code Section 3-4-60 to read as follows:

"3-4-60. The following state taxes are levied and imposed:

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all

distilled spirits an excise tax in the amount of 50¢ per liter and, upon the first sale, use, or final delivery within this state of all alcohol, an excise tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of 50¢ per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products."

Section 3. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of state excise taxes on wine, and inserting in its place a new Code Section 3-6-50 to read as follows:

"3-6-50. (a) There shall be levied and imposed on the first sale, use, or final delivery within this state of all table wines an excise tax in the amount of 11¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(b) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all table wines an import tax in the amount of 29¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(c) There shall be levied and imposed upon the first sale, use, or final delivery within this state of all

dessert wines an excise tax in the amount of 27 per liter and a proportionate tax at the same rate on all fractional parts of a liter.

(d) There shall be levied and imposed upon' he importation for use, consumption, or final delivery into this state of all dessert wines an import tax in the amount of 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter."

Section 4. It is the express intention of the General Assembly that the provisions of this Act shall not be severable. In the event that any section or portion of any section of this Act is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall render the entire Act invalid, void, and of no effect and shall specifically revive the provisions affected by this Act as such provisions stood before the enactment of this Act, as amended by laws other than this Act.

Section 5. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 6. All laws and parts of laws in conflict with this Act are repealed.

Approved April 1, 1985.

APPENDIX O

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

VERIFIED FIRST AMENDMENT TO COMPLAINT

Plaintiffs restate and reallege in full the allegations set forth in their Complaint filed in this matter on July 10, 1992. Plaintiffs further state and allege as follows:

I. GENERAL ALLEGATIONS

191. On November 19, 1992, the Supreme Court of Georgia issued its opinion in the case styled *Reich v. Collins*, Nos. S92A0621 & S92A0622 (hereinafter sometimes "*Reich*" or "*Reich v. Collins*").

192. According to the *Reich* opinion, the issue considered was the appellant taxpayer's "entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989)." *Reich*, slip op. at 1.

193. None of the Plaintiffs herein was a party to the *Reich* case at any stage of the proceedings in the *Reich* case.

194. Plaintiffs herein had no notice and no opportunity to be heard at any stage of the proceedings in the *Reich* case.

195. Defendants herein were either parties to the *Reich* case or privies of parties to the *Reich* case.

196. Defendants herein had both notice and an opportunity to be heard in the *Reich* case.

197. The appellant taxpayer in the *Reich* case "brought [his] action pursuant to OCGA § 48-2-35." *Reich*, slip op. at 2.

198. In Division 1 of its opinion in the *Reich* case, the Georgia Supreme Court stated that it "agree[d] with the trial court that the principles of *Davis v. Michigan* apply to this case." *Reich*, slip op. at 3 (footnote omitted).

199. In Division 1 of its opinion in the *Reich* case, the Georgia Supreme Court also stated that it "conclude[d] that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively." *Reich*, slip op. at 6.

200. In Division 2 of its opinion in the *Reich* case, the Georgia Supreme Court turned to the "issue of what remedy is to be afforded the appellant." *Reich*, slip op. at 7.

201. After discussing a tax refund proceeding brought by one of the Plaintiffs herein, *James B. Beam Distilling Co. v. State*, Civil Action File No. D-42527 (Fulton Super.), the Georgia Supreme Court specifically addressed the situation presented by "a vendor/taxpayer." *Reich*, slip op. at 7-8.

202. The appellant taxpayer in the *Reich* case was not a vendor/taxpayer, but Plaintiffs herein might be characterized as vendor/taxpayers.

203. The Georgia Supreme Court went on to prescribe a rationale for denying a tax refund to a vendor/taxpayer.

204. Division 2 of the opinion in the *Reich* case provides in full as follows:

> 2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, 115 LE2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . . . " *Beam*, 115 LE2d at 494.
>
> OCGA § 48-2-35 (a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him *under the laws of this state*, whether paid voluntarily or involuntarily . . . " (Emphasis supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it onto the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga.App. 169 (198 SE2d 900) (1973). Were we to interpret

> the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.
>
> Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35 (a).
>
> We take this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

205. Upon information and belief, in addressing a claim for tax refund by a purported vendor/taxpayer, when no such claimant was a party to the *Reich* case, the Georgia Supreme Court sought to control the outcome of the instant case without providing Plaintiffs herein notice and an opportunity to be heard.

II. CLAIMS FOR RELIEF

A. Statutory Refund Claim (O.C.G.A. § 48-2-35): Erroneous/Illegal Assessment and Collection by the Taxing Authority

* * *

B. Claim for Declaratory Relief (O.C.G.A. Title 9, Chapter 4)

* * *

211. Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, violates, both on its face and as applied, the United States

Constitution, including the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and the principles of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930), and of all similar predecessor cases and of all progeny.

212. Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, violates, both on its face and as applied, the United States Constitution, including the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, and the principles of *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810 (1947), and of all similar predecessor cases and of all progeny.

213. Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, violates, both on its face and as applied, the United States Constitution, including the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, and the principles of *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419 (1920), and of all similar predecessor cases and of all progeny by putting forward nonfederal grounds of decision that are without any fair or substantial support.

* * *

C. Alternative Omnibus State Law Claim for Refund with Interest

* * *

D. Claim Under 42 U.S.C. § 1983

* * *

219. Plaintiffs have been subjected and continue to be subjected to the deprivation of rights, privileges, or immunities secured by the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Import Export Clause of the United States Constitution, U.S. Const. art. I, § 10, cl.2; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny.

220. Plaintiffs are entitled under 42 U.S.C. § 1983 to a refund with interest to redress these deprivations.

E. Claim Under United States Constitution

* * *

222. Plaintiffs have been subjected and continue to be subjected to the deprivation of rights, privileges, or immunities secured by the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Import Export Clause of the United States Constitution, U.S. Const. art. I, § 10, cl.2; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const.

amend. XIV, § 1; and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny.

223. Plaintiffs are entitled to a refund with interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny (and/or under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Import Export Clause of the United States Constitution, U.S. Const. art. I, § 10, cl.2; and/or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1).

F. Claim Under 42 U.S.C. § 1988

* * *

APPENDIX P

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

VERIFIED SECOND AMENDMENT TO COMPLAINT

Plaintiffs restate and reallege in full the allegations in their Complaint filed in this matter on July 10, 1992 and in their Verified First Amendment to Complaint filed in this matter on April 19, 1993. Plaintiffs further state and allege as follows:

II. CLAIMS FOR RELIEF

G. Claim for Declaratory Relief (O.C.G.A. Title 9, Chapter 4)

* * *

228. Plaintiffs are therefore entitled under O.C.G.A. Title 9, Chapter 4 to a judgment declaring, among other things, that O.C.G.A. § 3-4-60 and the taxes and other burdens thereby imposed are illegal and unconstitutional under the laws of the State of Georgia and the United States for one or more of the reasons stated in the Complaint and the First Amendment to Complaint.

H. Claim For Injunctive Relief

* * *

230. For all of the reasons stated in the Complaint and the First Amendment to Complaint, O.C.G.A. § 3-4-60 is unconstitutional and illegal under the laws of the State of Georgia and the United States.

231. Accordingly, pursuant to O.C.G.A. §§ 9-4-3 & 9-4-10; O.C.G.A. Title 9, Chapter 5; O.C.G.A. § 9-11-65; O.C.G.A. Title 23; and otherwise, the Plaintiffs are entitled to a judgment preliminarily and permanently enjoining the Defendants from collecting taxes pursuant to and otherwise enforcing O.C.G.A. § 3-4-60.